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Citation Information

Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1 (2004), available at <https://scholar.law.colorado.edu/faculty-articles/496>.

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Citation: 27 Harv. Women's L.J. 1 2004

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WOMEN CHOOSING DIVERSE WORKPLACES: A RATIONAL PREFERENCE WITH DISTURBING IMPLICATIONS FOR BOTH OCCUPATIONAL SEGREGATION AND ECONOMIC ANALYSIS OF LAW

SCOTT A. MOSS*

OVERVIEW

Despite women's dramatic labor market gains, there remains a striking degree of occupational segregation by gender. Analysts typically blame discrimination or women's work/family priorities. This Article offers a different explanation.

It is hard for women choosing jobs or occupations to know where they will face discrimination, particularly since recent judicial decisions eliminated certain employer signals that once differentiated fair and discriminatory firms. One way women can effectuate a preference for nondiscriminatory workplaces is by choosing gender-diverse workplaces. Nondiverse workplaces often are not female-friendly, and discrimination may be the reason they are nondiverse. In economic terms, women rationally use level of diversity as a proxy for discrimination, since the latter is harder to observe.

When a preference for diversity is incorporated into standard labor-economic analyses, it generates a bleak prediction: women's preferences for diversity can yield enduring segregation, even in nondiscriminatory workplaces, and even as more women enter the labor force. Title VII has reduced discrimination and raised female labor force participation, but neither of these successes may reduce segregation.

Normatively, although this Article could be interpreted to support a "conservative" argument to narrow Title VII liability (because a workplace underrepresentation of women may reflect women's own choices rather than discrimination), it more forcefully supports a contrary "liberal" argument: to redress segregation, we must go beyond just fighting actual discrimination. Advisable measures include changes to the focus

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and burdens of proof in Title VII cases, affirmative action, and education reform.

More theoretically, certain standard economic tenets, such as fixed exogenous preferences and the Coase Theorem, are undercut by key features of these models (e.g., endogenous labor supply preferences, path-dependent market evolution, and multiple equilibria). We cannot assume that such markets, left unregulated, are efficient, so the case for labor market intervention is much stronger than economics typically recognizes.

I. INTRODUCTION

One of the more enduring riddles of the American labor market is that even as women have made dramatic labor market gains, there remains a striking degree of occupational segregation by gender. Women's progress in the labor market has been significant: their labor force participation rates have increased sharply¹ to within almost fifteen percent of men's.² Nearly half the workforce (forty-six percent) is now female,³ and the male-female wage gap, although still significant, has decreased.⁴

Yet occupational segregation by gender has persisted, to the great detriment of women. Women remain overrepresented in low-paying and underrepresented in high-paying occupations.⁵ "Even within narrowly defined occupations, men and women are often segregated across employers,"⁶ with some firms including women and others remaining male-dominated, in fields as wide-ranging as restaurants⁷ and major law firms.⁸

¹ RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY*, at inside back cover tbl. 6.1 (8th ed. 2003) (women's labor force participation rates, as a percentage of all women, hovered between 20.0% and 30.0% from 1900 through 1950, but rose to 37.7% in 1960, 43.3% in 1970, 51.5% in 1980, 57.5% in 1990, and 60.0% in 1999).

² BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *CURRENT POPULATION SURVEY*, <http://www.bls.gov/cps/home.htm> (Jan. 2004) (last visited Feb. 1, 2004).

³ JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 67 (2000) [hereinafter WILLIAMS, *UNBENDING GENDER*].

⁴ EHRENBERG & SMITH, *supra* note 1, at 379 (noting that women's earnings as compared to men's have increased from 50% in 1970, to 59% in 1980, to 65% in 1999, though the male-female wage gap has remained fairly stable since 1990).

⁵ *Id.* at 379–80.

⁶ *Id.* at 384.

⁷ *Id.* at 384 (noting that "it is common for restaurants to employ only waiters or only waitresses, but not both").

⁸ Even among law firms of similar prominence and type, the representation of women varies widely. For example, there are only twelve law firms in New York City with more than 300 associates. (I examine associates rather than partners because the gender gap in partners partly stems from hiring practices decades ago, whereas associate hiring reflects only recent hiring.) These are very similar firms: all recruit from the same law schools, serve major corporations as clients, and feature a wide range of practice areas. Yet despite having so much in common, they vary quite substantially in their inclusion of women as associates. At the top third in representation of women, about half (47–51%) of the associates are female: Simpson Thacher & Bartlett LLP (51%), Debevoise & Plimpton LLP (49%), Cleary, Gottlieb, Steen & Hamilton (47%), and Coudert Brothers LLP (47%). At

Historically, discrimination and harassment served to maintain traditional “patterns of sex segregation in employment that consigned women to lower-status, lower-paying, female-dominated jobs.”⁹ Segregation declined when women first entered the labor force in larger numbers, but “the pace slowed” and in the 1990s “fell by only a percentage point or two.”¹⁰ Surprisingly, although the black-white wage gap is wider than the male-female wage gap, “[o]ccupational segregation appears to be less prevalent by race than by gender [R]acial occupational dissimilarities are smaller and have fallen faster over time than gender-related ones.”¹¹

Perhaps worst of all, there has been virtually no decrease in the gender segregation of particular occupations and jobs. Many occupations are less than five percent or more than ninety-five percent female—mainly blue-collar, mechanical, and other stereotypically “male” work and office assistance or caregiving “female” work, respectively.¹² Segregation is present not only among fields, but also at the micro-level; even within the same workplace, women often are clustered into “pink-collar ghettos” of lower-status departments.¹³ In white-collar jobs, the “glass ceiling” remains; women are only a small fraction of law firm partners, executives at publicly traded companies, and tenured professors.¹⁴

Labor economists and legal analysts alike offer dual explanations for the riddle of continued segregation. First, women may be excluded from

the middle third, 42–43% of the associates are female: LeBoeuf, Lamb, Greene & MacRae LLP (43%), Shearman & Sterling LLP (43%), Weil, Gotshal & Manges LLP (43%), and Davis Polk & Wardwell (42%). At the bottom third, only 37–39% of associates are female. At the bottom, predictably, is Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates (37%)—a figure that has remained unchanged for the past three years), followed closely by Milbank, Tweed, Hadley & McCloy LLP (38%), Sullivan & Cromwell LLP (38%), and Cravath, Swaine & Moore LLP (39%). NAT’L ASS’N FOR LAW PLACEMENT, NALP DIRECTORY OF LEGAL EMPLOYERS 1288, 1291, 1293, 1295, 1297, 1340, 1348, 1375, 1377, 1379, 1383, 1392 (2003) [hereinafter NALP DIRECTORY].

⁹ Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2075 (2003).

¹⁰ EHRENBURG & SMITH, *supra* note 1, at 384. The “index of dissimilarity”—a measure of “the percentage of the other gender that would have to change occupations for the two genders to have equal occupational distributions”—was 68 in 1970, 59 in 1980, and 53 in 1990, with only a one to two percent decrease in the 1990s. *Id.* at 383–84.

¹¹ *Id.* at 391 (noting further that “indices comparing black and white occupational distributions had values roughly half the size of indices comparing male/female occupational distributions”).

¹² Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 292 tbl.3 (2000) [hereinafter Jolls, *Mandates*]. Jolls’s research includes sixty-nine occupations that were more than 95% male, most notably a wide range of blue-collar/mechanical jobs, including supervisory positions, numerous transportation jobs (such as airplane pilots and ship captains), and firefighting. Seven fields were more than 95% female: secretaries (98.7%), dental hygienists (98.4%), prekindergarten and kindergarten teachers (97.8%), childcare workers in private households (97.3%), dental assistants (97.1%), receptionists (95.7%), and childcare workers other than private households (95.6%). Jolls adds that “[m]any more occupations were between ninety and ninety-five percent female or male” *Id.* at 292.

¹³ See *infra* note 217 (citing evidence and examples of segregation within firms and subfields of occupations).

¹⁴ WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 67.

certain occupations¹⁵ by discriminatory employers and by the resulting disincentive for discriminated-against workers to accumulate education and training. Second, women may have "different preferences . . . or different household responsibilities (particularly related to child care)."¹⁶ The latter explanation may reflect either innate gender differences or "premarket discrimination—differential treatment by parents, schools, and society at large that points girls toward lower-paying (including household) pursuits."¹⁷ The above explanations demonstrate the central debate: whether segregation is due to discrimination (in employment or childhood) or women's inherent preferences.

Discrimination and work-family conflict certainly play a role,¹⁸ as does early socialization, though not to as large an extent as is commonly assumed, given the evidence that women's preferences for different types of work change substantially throughout their careers.¹⁹ However, this Article suggests an important additional reason for the labor market's halting progress toward equality and the surprising degree of segregation that remains.

It is well-established that women prefer nondiscriminatory workplaces. But for a woman facing a real-world choice among jobs or occupations, it is hard to tell which employers discriminate, especially since recent developments in employment discrimination have mandated many of the employment policies, such as family/parental leave and workplace promises of nondiscrimination, that employers once used to "signal" gender inclusiveness.

One way women can effectuate their preference for nondiscriminatory workplaces is by choosing gender-diverse workplaces—workplaces that feature a mix of men and women.²⁰ This result may sound obvious, but these criteria (nondiscrimination and gender diversity) are not perfectly overlapping: gender-diverse workplaces may still be affected by gender discrimination, and nondiverse workplaces may not be. Nevertheless, the level of diversity does convey useful information about discrimination. A nondiverse workplace might have developed as a result of gender discrimination, and nondiverse workplaces have certain characteristics inherently disadvantageous to women. Given the history of discrimination and exclusion, the assumption of a connection between gender diversity and better treatment of women is entirely reasonable. In

¹⁵ Women may also be preferred for certain occupations, such as the various office assistance or caregiving "female" jobs that are more than ninety-five percent female. See Jolls, *Mandates*, *supra* note 12.

¹⁶ EHRENBERG & SMITH, *supra* note 1, at 383.

¹⁷ *Id.*

¹⁸ See generally WILLIAMS, *UNBENDING GENDER*, *supra* note 3 (arguing that work-family conflict is at the heart of much of today's workplace inequality by gender).

¹⁹ See *infra* text accompanying notes 236–247.

²⁰ See *infra* note 197 for a more detailed definition of gender diversity as the term is used in this Article.

economic terms, women rationally use the level of diversity as a proxy for discrimination, which is more difficult to observe. In this light, women's preference for diversity is "rational discrimination" by *employees* against *employers*—a generalization that, though imperfect, is logical given employees' imperfect information about which employers discriminate.

Worker decisionmaking under conditions of imperfect information is a subject ripe for economic analysis. Yet a preference for diverse workplaces is not incorporated into standard economic analyses of workplace gender disparities. When taken into account, this preference dramatically changes the predictions about the durability of gender disparities. To the extent that women disproportionately choose workplaces already employing a significant number of women, those workplaces become even more inclusive of women. Those without many women will find themselves, over time, lacking female applicants and lagging even further in diversification.

This Article uses several economic models—some quantitative, others qualitative but based on economic theory—that predict that even as more women enter the labor force, the gender gap between diverse and nondiverse occupations (or individual firms) will grow. Just as disturbingly, several models predict that women's preferences for diversity can lead to enduring segregation even in industries (or individual firms) that do not discriminate. The Title VII era has reduced discrimination and increased female labor force participation—two successes that have been widely viewed as the two-part cure for occupational segregation. This Article sounds a note of pessimism in predicting that neither of these two advances may be sufficient to reduce gender segregation in the labor market. Discrimination does, however, exacerbate the degree and durability of occupational segregation, as this Article's models illustrate.

The Article then turns to the normative implications of the economic models presented. These models could be interpreted to support a "conservative" argument that a predominantly male workplace might lack women even though it has not discriminated against women and, therefore, that a statistical gender disparity does not necessarily prove discrimination. Further, the ideas presented here could be used to support the argument that it is women's fault that labor markets remain segregated—a variant of the "lack of interest" argument used by some employers with egregious gender segregation. However, this is a flawed interpretation that ignores the constraints on women's work choices.

This Article's observations more forcefully support an entirely contrary, more "liberal" argument: to redress occupational segregation, society must go beyond fighting just what currently constitutes legally actionable discrimination. Since current antidiscrimination laws alone will not abolish segregation given women's preference for diverse workplaces, further measures to reduce segregation should be taken, including changes

in the focus and burdens of proof in Title VII cases, affirmative action, and educational reform.

Finally, this Article discusses the theoretical implications of its models for economic analysis of law. Several standard economic assumptions, such as fixed preferences and the efficiency of free market transactions (the Coase Theorem), are undercut by key features of these models. Women's labor supply preferences are endogenous in that they depend on the level of female labor already being supplied. Labor market evolution thus is path-dependent, hinging on earlier market phenomena. Depending on its history, the labor market can reach multiple equilibrium outcomes, some far more efficient than others. In such situations, there is little basis for assuming that unregulated markets will reach efficient outcomes. The case for a laissez-faire policy of nonintervention in labor markets is therefore weaker, and the case for legal or regulatory intervention stronger, than economic analyses typically recognize.

II. DISCRIMINATION AS A DETERRENT TO WORKFORCE ENTRY

A. *The Ability (and Failure) of Most Economic Models To Incorporate Women's Nonmonetary Preferences*

Traditional economics assumes that money drives people to buy or sell goods or services. The basic labor supply graphic model reflects this, showing the direct relationship between wages and workers' willingness to accept jobs or additional hours.²¹ Higher wages certainly are a primary motivation for workers; even people with other job goals will, all else being equal, take the higher-paying job.²² Wages are not the whole story, of course, and labor economists do not pretend they are: "nonpecuniary factors—such as work environment, risk of injury, personalities of managers, perceptions of fair treatment, and flexibility of work hours—loom larger in employment transactions than they do in markets for commodities."²³ Indeed, it is a "common misconception[] about economics . . . that it slights non-quantifiable costs and benefits."²⁴ For example, even bigotry is a nonmonetary preference that economic analyses can consider

²¹ See, e.g., EHRENBERG & SMITH, *supra* note 1, at 40 fig. 2.9.

²² *Id.* at 40–41.

²³ *Id.* at 2.

²⁴ RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 1.1, at 7 n.8 (5th ed. 1998) [hereinafter POSNER, ECONOMIC ANALYSIS]; see also Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 169 (2000) (noting, in a generally critical discussion of contemporary economic analysis of law, that Posnerian economic analysis allows for people to "have bizarre tastes and pursue 'crazy' goals so long as [they] . . . consistently pursue those goals"). But see Richard Epstein, *Standing Firm, On Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 21–22 (1994) (arguing against legal redress for psychological harm to victims of discrimination and asserting that such persons should "learn to deal with offensive and rude statements without recourse to law").

in analyzing labor market decisions; Richard Posner has written that “contact between members of the two races . . . imposes nonpecuniary, but real, costs on those . . . who dislike association with members of the other race.”²⁵ If economics can incorporate nonmonetary preferences such as *distaste* for diversity, then it can certainly incorporate *preference* for diversity.

B. Women's Preference for Nondiscriminatory Workplaces

1. Women's Preference for Fair Workplace Treatment: The Basic Economics

Viewed in the broadest sense, men and women have the same workplace preferences—tangible items such as compensation and promotion, as well as intangibles such as fair treatment.²⁶ This does not mean everyone seeks the same *specific* ends. Gary Becker has noted that even if people pursue “general ends that remain constant,” they pursue more specific goals “as means [to those] more general ends.”²⁷ Furthermore, even as people pursue the same universal goals, their specific preferences change based on social circumstances.²⁸

Given the deep-rooted gender problems of the modern workforce, including discrimination and harassment, it is entirely rational for female job seekers to consider how various workplaces treat women. That specific preference is a means to the more general, universal preference of fair workplace treatment. Basic economic logic supports such a strategy for female workers: discrimination lowers the expected payoff (monetary or otherwise) of employment, so with less discrimination, women “are likely to be more willing to supply labor at any given wage.”²⁹

²⁵ POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.4, at 715; *see also* Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 204–05 (1998) (citing Epstein, *supra* note 24, at 42, 75). In analyzing what motivates employment decisions, economic theory does not approve of such preferences; rather, it simply recognizes that some people act not just upon their monetary interests but also upon their personal biases.

²⁶ *See generally* EHRENBERG & SMITH, *supra* note 1, at 231–33. “The assumption that workers are attempting to maximize their utility implies that they are interested in both the pecuniary and the nonpecuniary aspects of their jobs,” including “the work environment, the risk of injury,” “discretion over the hours or the pace of work,” “commuting distances and neighborhood characteristics.” *Id.* at 231–32.

²⁷ Schroeder, *supra* note 24, at 212 (quoting GARY S. BECKER, *ACCOUNTING FOR TASTES* 87 (1996)).

²⁸ *See id.*

²⁹ Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 691 & n.222 (2001) [hereinafter Jolls, *Antidiscrimination*] (citing John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1349 (1989)); *see also* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815–39 (1990) [hereinafter Schultz,

2. *Effects of Discrimination on Women's Choices To Enter or Remain in the Workforce*

As Vicki Schultz has discussed, women often face what could be called the *direct* effects of discrimination in traditionally male fields: men stereotype women and try to exclude them from the workplace, and female workers, less likely to be treated well, are more likely to quit.³⁰ She argues that to the extent that women prioritize family or leisure over work, they do so because they perceive little opportunity for career advancement.³¹ In traditionally male fields, male hostility (e.g., harassment, sabotage, denial of training) makes women less likely to succeed.³² Regardless of differing views as to why discrimination occurs, there remains a "broad range of empirical evidence"—studies of the gender wage gap, testing of employer treatment of identical male and female applicants, and widespread cases of discrimination—"that an important part of the explanation for women's present labor market position is the continued existence of . . . discrimination against women."³³

The problem, however, is not limited to women who directly face discrimination; it also includes the *indirect* effects of discrimination, which heavily influence female labor force participation. In several ways, discrimination discourages women from entering (or remaining in) the workforce, and particularly from seeking traditionally male jobs.

Telling Stories].

³⁰ Schultz, *Telling Stories*, *supra* note 29, at 1834 ("Harassment is . . . driving the small number of women in nontraditional jobs away. Blue-collar tradeswomen report that women are leaving the trades because they cannot tolerate the hostile work cultures, and there are signs that this is occurring in male-dominated professions as well."). In *Vermett v. Hough*, 627 F. Supp. 587 (W.D. Mich. 1986), for example, the court made several telling findings of fact in a case involving a female state trooper's claims of gender discrimination and harassment by the Michigan Department of State Police: "Out of 75 male[s] and 22 females admitted to the school, 53 males and 10 females graduated"; "Vermett was the first female trooper ever assigned to [her location] [At her next location,] she was one of over 80 troopers. She was the fifth female"; "[i]t is evident that the Department had serious problems associated with the entry of females and other minorities as troopers," including a high attrition rate. *Id.* at 590, 591–92, 602. Nevertheless, the court rejected Vermett's claim, relying on the Department's affirmative action efforts and finding the plaintiff to be

an insecure and very angry woman; insecure in her abilities, angry at men in general and her male co-workers and superiors in particular. Vermett's words demonstrate an individual highly suspicious of each male act or failure to act, word or silence, and her imagined motives behind each In sum, the attitude displayed is of a deeply troubled woman pre-disposed to interpret her experiences at the State Police as sex discrimination or sexual harassment and thereby, tragically, destined to fail.

Id. at 600.

³¹ Schultz, *Telling Stories*, *supra* note 29, at 1827–31 (noting that the same is true of men in dead-end jobs).

³² *Id.* at 1832–39.

³³ Christine Jolls, *Is There a Glass Ceiling?*, 25 HARV. WOMEN'S L.J. 1, 2, 5–7, 9–15 (2002) [hereinafter Jolls, *Glass Ceiling*].

a. The Human Capital Problem: Expectation of Discrimination as a Disincentive to Women's Workforce Participation

Expectation of discrimination is a disincentive to obtaining education or training, or otherwise expending time and money, preparing for a career. This is the cycle of diminished human capital that discrimination causes: "[W]hen discrimination lowers a rational actor's reasonable career expectations, he or she spends less time, effort, and money amassing human capital, as discrimination lowers the rate of return on that capital."³⁴ One cause of discrimination is animus-based bias (e.g., misogynist refusals to hire women). Another is stereotypical employer judgments based on group status (e.g., assuming a certain level of competence for all women in certain positions or assuming that all women will become pregnant at some point and leave their jobs). As Robert Cooter has explained, "[i]f employers attribute to each individual the average productivity of members of the group . . . , each individual will have a tendency to under-invest in acquiring productivity-increasing skills."³⁵

Not only does discrimination lower human capital, it also negatively influences the strategic choices of discriminated-against groups. David Charny and G. Mitu Gulati note that such workers have an increased incentive to engage in various otherwise ill-advised workplace strategies: "high-risk" strategies (e.g., taking on a longshot project) to break out of a stereotype and signal "superstar" status, or "low-effort" strategies (e.g., working fewer hours) because the prospect of being judged by a stereotype rather than by performance makes it less worthwhile to work hard.³⁶ Though perhaps a rational response to discrimination, these strategies can be self-defeating. Even talented workers may fail at high-risk endeavors, and many talented (or at least competent) workers' careers will stall due to low-effort strategies.³⁷ As a result, discriminated-against groups will have fewer successful workers, and "[t]he perception of discrimination on the part of the minority workers becomes a self-fulfilling prophecy."³⁸

Women's lower levels of workforce participation may also be a rational response to discrimination. As Christine Jolls has noted, when a

³⁴ Moss & Malin, *supra* note 25, at 205 (citing R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DET. C.L. REV. 1163, 1209 (1993) (discussing the problem in the context of disability discrimination)); *see also* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 65 (1998); EHRENBURG & SMITH, *supra* note 1, at 388 (noting that the current wage gap "could discourage women from making certain human capital investments," though it is unclear how much of the gap results from discrimination).

³⁵ Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 158 (1994); *see also* Charny & Gulati, *supra* note 34, at 65.

³⁶ Charny & Gulati, *supra* note 34, at 84-85, 91.

³⁷ *Id.* at 91.

³⁸ *Id.*

married couple feels the need for one person to suspend or limit workforce participation because of family needs such as childcare, and if "because of sex discrimination . . . [women] will have fewer opportunities and earn less than their male counterparts, then it makes perfect financial sense for the female rather than the male . . . to take the leave or depart from her current employer to provide her better-suited partner with greater career opportunities."³⁹ Even absent a higher-earning husband,⁴⁰ this effect on women remains because the backdrop of discrimination makes it "natural for aspirations and values to develop such that male employees, more so than female employees, view career advancement as central to their identities and life goals."⁴¹

b. Expectation of Discrimination in Particular Fields: Disincentive to Women's Participation in Traditionally Male Jobs

Expectation of discrimination functions as a disincentive not only to workforce participation generally but also to participation in the *particular* fields with the most discrimination. The problems in such fields include overt discrimination that seeks to exclude women, harmful psychological effects of stereotyping, and human capital disincentives based on this discrimination and stereotyping.

i. Gender Discrimination in Traditionally Male Jobs

Schultz has noted that "[w]omen in female jobs understand that they will be likely to experience harassment if they attempt to cross the gender divide."⁴² She has written at length about the "proven link between hostile work environment harassment and job segregation."⁴³ Specifically, there is a "classic pattern of harassment often directed at women who try to claim male-dominated work as their own" by trying to enter traditionally male fields.⁴⁴ Such harassment is aimed at "driving women out of

³⁹ Jolls, *Glass Ceiling*, *supra* note 33, at 16; *see also* POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 5.1, at 157 (asserting that "to the extent that sex discrimination in the labor market depresses women's market earnings relative to men's, it makes household work relatively more attractive to the wife than to the husband").

⁴⁰ For example, families with single parents, lesbian couples, or lower-earning husbands.

⁴¹ Jolls, *Glass Ceiling*, *supra* note 33, at 16; *see also* Schultz, *Telling Stories*, *supra* note 29, at 1827 (discussing how members of either sex, but more often females, who face "little opportunity for growth or upward mobility," will "turn[] their energies elsewhere," "not define work as a central life interest," "dream of escape from their jobs and often interrupt their careers").

⁴² Schultz, *Telling Stories*, *supra* note 29, at 1834.

⁴³ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1801 (1998) [hereinafter Schultz, *Harassment*].

⁴⁴ *Id.* at 1712. Schultz points to *Harris v. Forklift Systems, Inc.*, a landmark case of blue-collar workplace gender discrimination in which a male employee's conduct—

nontraditional jobs.”⁴⁵ In arguing that the focus of antiharassment law should be the negative effects of harassment on women’s workplace equality, not workplace sexuality, Schultz contends that “[w]here sexual misconduct occurs, it is typically part of a broader pattern of harassment designed to reinforce gender difference and to claim work competence and authority as masculine preserves.”⁴⁶ In this light, harassment is “both a cause and consequence of larger forms of gender-based stratification of work, such as job segregation by sex and the accompanying wage and status inequalities.”⁴⁷

Women develop negative expectations about specific fields not only from their own experiences but also from the experiences of others. Shawn Pompian has noted that “there is a persuasive argument that members of minority groups . . . share the unifying feature of a similar experience as the targets of discrimination and oppression.”⁴⁸ As a result, “members of excluded minority groups . . . may have heard anecdotal evidence of discrimination from friends and acquaintances within their community” because of the “likelihood that communities develop an awareness of which sorts of opportunities are open to them and which are foreclosed because of discrimination.”⁴⁹

Historical perspective also helps to indicate which employment opportunities are available to women. Because “employers have historically relegated women to low-paid, traditionally female jobs,” women may not aspire to traditionally male jobs; “[m]ost people do not aspire to something they have never been permitted to do.”⁵⁰ This history of negative treatment depresses women’s expectations of success; consequently, women may “lower[] their work aspirations and turn[] their energies elsewhere,”⁵¹ to fields traditionally more welcoming to women or nonwork pursuits.

from the “sexual” conduct that reduced Harris to a sexual object as she struggled to fulfill her work role, to the nonsexual but gender-biased conduct that denigrated her capacity to serve as a manager, to the facially gender-neutral conduct that denied her the perks, privileges, and respect she needed to do her job well—had the purpose and effect of undermining Harris’s status and authority as a manager on the basis of her sex.

Id. (discussing *Harris*, 60 Empl. Prac. Dec. (CCH) P 42,070, at 74,247 (M.D. Tenn. 1990), *aff’d*, 976 F.2d 733 (6th Cir. 1992) (per curiam), *rev’d*, 510 U.S. 17 (1993)).

⁴⁵ *Id.* at 1760.

⁴⁶ *Id.* at 1759.

⁴⁷ *Id.* at 1797.

⁴⁸ Shawn Pompian, *Expectations of Discrimination as a Justification for Affirmative Action*, 8 VA. J. SOC. POL’Y & L. 517, 532 (2001).

⁴⁹ *Id.* at 546–47.

⁵⁰ Schultz, *Telling Stories*, *supra* note 29, at 1793.

⁵¹ *Id.* at 1827.

ii. *Stereotype Threat*

When women work in fields that are stereotyped as male, the backdrop of discrimination can interfere with women's performance as well as their inclination to remain in such jobs. One example of this harm is "stereotype threat":

[W]hen certain groups of individuals realize that a negative stereotype exists about their group in a given context (e.g., Blacks in academics, females in mathematics), this mere recognition can significantly hinder their performance in that domain. Although the individual does not have to believe the stereotype, he or she will still feel the threat of being evaluated in terms of the stereotype, . . . [a] threat engendered by the fear of confirming the stereotype however false it may be.⁵²

Stereotype threat has been shown to affect women in math⁵³ and "can affect the members of any group about whom a negative stereotype exists."⁵⁴ The first women entering traditionally male fields risk being viewed as "token" females less competent for the job. This tokenism "will increase stress" due to the prospect of "greater scrutiny,"⁵⁵ which is why "groups constantly fac[ing] stereotype threat . . . will seek to protect themselves by withdrawing from or 'disidentifying' with the affected areas of activity."⁵⁶ The ultimate result is that stereotyping not only can cause group members to underperform but also "can, over the long term, cause . . . reduce[d] participation in activities to which a negative stereotype applies."⁵⁷

iii. *The Human Capital Problem in Particular Fields: General and Specific Human Capital*

The "perception of employment discrimination[] may act as a barrier to entry," inhibiting workers from entering those fields in which dis-

⁵² Jessi L. Smith & Paul H. White, *Development of the Domain Identification Measure: A Tool for Investigating Stereotype Threat Effects*, 61 EDUC. & PSYCHOL. MEASUREMENT 1040, 1041, 1053 (2001) (citations omitted); see also Pompian, *supra* note 48, at 540-43 (discussing stereotype threat, mainly as applied to African Americans).

⁵³ Smith & White, *supra* note 52, at 1040-42.

⁵⁴ Pompian, *supra* note 48, at 542 n.83 (quoting Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 203-04 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998)).

⁵⁵ *Id.* at 540 n.74 (quoting Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2258-59 n.79 (2001)).

⁵⁶ *Id.* at 541 (citing Steele, *supra* note 54, at 204-05).

⁵⁷ *Id.* at 542.

crimination is rampant.⁵⁸ This is the human capital problem again, but in a more concentrated form—a disincentive to gaining human capital associated with traditionally male fields. A discriminated-against group will avoid not only specific tests or applications in, but also the educational investments required to enter, fields beset with negative stereotypes of the group.⁵⁹ Posner has noted the importance of distinguishing two types of human capital: “general human capital” and “firm-specific human capital.”⁶⁰ However, the relative generality or specificity of human capital exists along a spectrum. Certain learning may be applicable to a broad range of jobs (e.g., high school education), only to certain fields (e.g., legal training), or only to a specific job (e.g., experience with a company’s proprietary technology).

The more discrimination there is in a particular field or firm, the less incentive women will have to obtain field-specific or firm-specific human capital, as women will “naturally choose not to invest in education and training that would serve only to prepare them for employment in . . . foreclosed fields.”⁶¹ This is especially true for expensive specific human capital, such as graduate degrees, which are costly and require years of little or no income.⁶²

iv. *Women Exiting Workplaces That Discriminate*

Women are disproportionately likely to exit male-dominated workplaces. Many anecdotal examples exist of women becoming discouraged and leaving traditionally male work.⁶³ Schultz has gathered considerable

⁵⁸ Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1118 (2001).

⁵⁹ Pompian, *supra* note 48, at 542–51.

⁶⁰ POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 11.4, at 358.

⁶¹ Pompian, *supra* note 48, at 543.

⁶² See Adams, *supra* note 58, at 1118.

⁶³ See, e.g., *supra* note 30 (discussing gender segregation and female attrition in police departments and among blue-collar tradeswomen). There are also numerous examples from the legal profession. See, e.g., Maryann Jones, *And Miles To Go Before I Sleep: The Road to Gender Equity in the California Legal Profession*, 34 U.S.F. L. REV. 1, 39 n.317 (1999) (recounting that “women broke into many traditionally male jobs in the 1970’s, but are no longer there . . . Title VII allowed women to get hired, but pervasive sexual harassment resulted in many women quitting” (citing Mary C. Dunlap, *Are We Integrated Yet? Pursuing the Complex Question of Values, Demographics and Personalities*, 29 U.S.F. L. REV. 693, 703 (1995))); *id.* at 44 n.344 (noting that “women are twice as likely as men to think about leaving an associate position with a large firm” (citing Deborah K. Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 12 WOMEN’S RTS. L. REP. 9, 23–24 (1990))); Charny & Gulati, *supra* note 34, at 86 n.100 (noting that “women exit law practice 60% ‘more quickly’ than men”) (citing Fiona M. Kay, *Flight from Law: A Competing Risks Model of Departures from Law Firms*, 31 L. & SOC’Y REV. 301, 327 (1997)); cf. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42 (discussing the phenomenon of professional women leaving their careers in part because high-powered jobs in fields such as business and law do not accommodate their needs).

evidence of this phenomenon, concluding that "women in higher-paying, male-dominated occupations are much less likely to remain . . . than are women in lower-paying female-dominated occupations Thus, just as employers appear to have begun opening the doors to nontraditional jobs to women, almost as many women have been leaving . . . [as] entering."⁶⁴

In short, discrimination continues to deprive women of opportunities, and women's expectations of that discrimination continue this cycle. People typically "adapt their conduct and even their desires to what has been available,"⁶⁵ a principle that rebuts the argument that occupational segregation simply results from women's choices.

As discussed above, discrimination and expectations of discrimination explain a substantial portion of the workplace gender inequities and disparities that continue to exist. The discrimination-plus-expectations story, however, cannot fully explain gender disparities among fields, occupations, or particular employers, because, as the next Part discusses, women often have little information about the extent of discrimination in a given occupation or workplace. Like anyone making an important decision based on incomplete information, women may use, as a proxy for the likelihood of discrimination, other more visible information—specifically, the number of women present in that particular occupation or workplace. As later Parts discuss, such decisionmaking by women makes gender disparities even more durable and self-perpetuating than previously realized.

III. WOMEN'S PREFERENCE FOR DIVERSE WORKPLACES: THE ECONOMIC RATIONALE

A. *Use of Proxies Under Imperfect Information: The Example of "Statistical Discrimination"*

Many economic analyses discuss "statistical discrimination": discrimination not because one dislikes a group but because one thinks its members are more likely to cause certain costs or difficulties, such as employers discriminating against young women (fearing pregnancy leave) or disabled workers (fearing accommodation costs).⁶⁶ Better employer in-

⁶⁴ Schultz, *Telling Stories*, *supra* note 29, at 1825–26 (citing J. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS* 141–42 (1989)). Jacobs collects data that shows "a disproportionate—and alarmingly high—rate of female attrition from male-dominated occupations" as well as that women who leave jobs in male fields enter "female" fields more often than the reverse. *Id.* at 1825–26 nn.286–87.

⁶⁵ Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217, 236 (1993) [hereinafter Sunstein, *Endogenous Preferences*].

⁶⁶ Some claims of statistical discrimination are dishonest or at least inaccurate. See Moss & Malin, *supra* note 25, at 202–03 (noting that "employer assertions that discrimination is based on real costs may be pretexts for bigotry The pretext is transparent when discrimination is blatantly overinclusive or underinclusive toward the asserted non-

formation (e.g., whether a certain individual with a medical condition will require accommodations) could mitigate employer concerns, but it is often impractical or illegal to obtain such information (e.g., about pregnancy plans) in the hiring process.⁶⁷ Even when employers do ask such questions, employees may lie or genuinely may not know certain information in advance (e.g., whether a woman will become pregnant or whether a disability will worsen and then require accommodation). Moreover, employers can invest only so much time and effort in the hiring process; they often “do not have the resources to examine the individual . . . applicants, and instead make judgments based on group affiliations.”⁶⁸

Judgments based on group affiliation risk inaccuracy, yet they may still be profit-maximizing. While complete information yields more accurate decisions, it is costly (or impossible) to obtain—a difficulty that induces employers to resort to statistical discrimination.⁶⁹ Employers “economize[] on the costs of information”⁷⁰ by making decisions based on easily visible characteristics, such as gender or age, rather than harder-to-obtain individualized information. If the visible characteristic correlates reasonably well with whatever cost the employer seeks to avoid, it is profit-maximizing to discriminate.⁷¹ The inaccurate decisions that result from statistical discrimination do impose a cost on employers—the loss of a well-qualified member of the disfavored group. However, that cost may not be great enough to deter employers from discriminating.⁷²

Statistical discrimination is an example of how, “[i]n the face of incomplete information on individual applicants, employers rely on their reasoning, intuition, and background knowledge to fill in the blanks.”⁷³

bigoted end, but this is rare.”). Other times, statistical judgments may be exaggerated stereotypes because psychological limitations bias estimates of probabilities. *Id.* at 207. Employers also might overestimate negative qualities of a discriminated-against group due to cognitive biases that “make[] stereotypical views self-reinforcing”: the “availability heuristic” causes people to “extrapolate not from a random sample of information, but only from what [they] happen to hear.” *Id.* This bias is exacerbated by the “confirmation bias,” which makes people “not equally open to all information, but more open to that which comfortably confirms their views.” *Id.* at 208.

⁶⁷ See, e.g., *Senuta v. City of Groton*, No. 3:01-CV-475, 2002 U.S. Dist. LEXIS 10792, at *6 (D. Conn. Mar. 5, 2002) (awarding injunctive relief to a woman claiming she was denied a firefighter job in favor of men ranked lower on an eligibility list). During the job interview, the defendant asked the plaintiff numerous questions about her family life, such as her childcare arrangements. *Id.*

⁶⁸ Charny & Gulati, *supra* note 34, at 64; see also Cooter, *supra* note 35, at 157–58 (discussing discrimination based on imperfect information, where the employer knows little about the employee).

⁶⁹ See Charny & Gulati, *supra* note 34, at 64; Cooter, *supra* note 35, at 157–58; ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* § 5.3, at 164 (5th ed. 2001).

⁷⁰ POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 11.7, at 368.

⁷¹ See *id.* § 26.5, at 725; PINDYCK & RUBINFELD, *supra* note 69, § 5.3, at 164; Moss & Malin, *supra* note 25, at 202.

⁷² See *infra* Part IV.B.2.c (discussing how the cost of rectifying discrimination may be high enough to reinforce tendencies to discriminate).

⁷³ Moss & Malin, *supra* note 25, at 207.

The following Parts discuss this same phenomenon at work in *employee* decisionmaking: in the face of incomplete information on individual *employers*, applicants rely on their reasoning, intuition, and background knowledge to fill in the blanks.

*B. Reverse Statistical Discrimination: Female Employees'
"Discrimination" Against Employers with an Underrepresentation
of Women*

According to economic theory, an employer offering employees something better than other employers do (e.g., better salary, retirement plan, or work environment) tries to market itself to workers by disclosing, or signaling, that trait. Even if firms with gender discrimination problems try to hire as many women at the same wages as nondiscriminatory firms, Charny and Gulati have reasoned that "employees will migrate towards the firms that signal themselves as fairer."⁷⁴ The question becomes how employers can signal fairness and how women can detect such signals. Current antidiscrimination law has made such signaling increasingly difficult.

*1. Female Job Applicants' Information Problem: The Difficulty of
Knowing Which Workplaces Discriminate*

*a. Limited Employee Resources for Researching and Applying
for Jobs*

As discussed above, employers engage in statistical discrimination because of several limitations on their information about job applicants. Employers lack (1) unlimited resources to interview all applicants, (2) infinite time, money, or ability to research the leading candidates, and (3) the ability to foresee whether better candidates will apply.

Job applicants are in much the same position as employers: they must make employment decisions in the face of limited information. They lack (1) unlimited resources to interview with all employers, (2) infinite time, money, or ability to research the leading candidates, and (3) the ability to foresee when they have a job offer whether better offers will arrive.⁷⁵

⁷⁴ Charny & Gulati, *supra* note 34, at 94.

⁷⁵ See EHRENBERG & SMITH, *supra* note 1, at 510–12 (discussing ways in which "information about job opportunities . . . is imperfect," and how this results in (1) mismatches of employers and employees, (2) "search unemployment" (i.e., remaining unemployed while searching for a job or holding out for better offers), and (3) "underemployment" (i.e., the opposite of search unemployment—taking an inferior job due to the uncertain odds of finding a better one)).

In this sense of having to ration finite job search resources, female job applicants are, ironically enough, in the same position as employers who engage in statistical discrimination. Because of their "limited resources to devote to looking for work," they have to distinguish, or "sort," prospective employers to focus their job search efforts.⁷⁶ However, applicants are likely to have difficulty sorting based on a preference to avoid discrimination.

b. The Difficulty of Spotting Discrimination

Job applicants are largely unknown quantities to employers, and the reverse is also true. When workers first enter an occupation, they "have much less information about the reputations" of employers than they would like.⁷⁷ Absent information on how a new workplace treats women, female applicants may fall back on "knowledge of the pervasiveness of stereotypes and discrimination in society at large."⁷⁸ However, this assumption that workplaces treat women in the same manner as society at large does not help workers distinguish among fields or employers. To make such judgments, workers need to know how one field or employer compares to another.

It is not easy for applicants to discern which workplaces discriminate. Anecdotal evidence may exist,⁷⁹ but such information is limited and not a comprehensive examination of an entire occupation or labor market. Anecdotes are also of questionable accuracy because they typically spread slowly and do not include the date of occurrence. As a result, anecdotes may be both too slow in circulating to reflect the latest events and too slow to cease circulating when out of date. Workplaces and occupations can change substantially in their inclusion of women,⁸⁰ rendering discrimination anecdotes untrustworthy. Thus, anecdotes are an inadequate way to determine which employers discriminate.

⁷⁶ Charny & Gulati, *supra* note 34, at 73 (noting that, among other methods, employees sort by assessing their odds of success at obtaining particularly competitive and desirable jobs).

⁷⁷ Pompian, *supra* note 48, at 547.

⁷⁸ *Id.*

⁷⁹ See *supra* notes 48–49 and accompanying text.

⁸⁰ Not long ago, for example, almost all law firms would have appeared on the list of occupations with fewer than five percent women. Now, however, twenty-nine percent of lawyers are female. David E. Steinberg, *More of the Same: Elitism and Exclusion at the AALS Annual Meeting*, 54 ME. L. REV. 251, 270 (2002) (citing 2001 data from the U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYED PERSONS DETAILED BY OCCUPATION, SEX, RACE, AND HISPANIC ORIGIN 177 (2001), available at <http://www.bls.gov/cps/cpsaat11.pdf> (last visited Feb. 1, 2004)). Furthermore, "roughly half the entering employees are women" in law firms today. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L. J. 77, 88 (2003).

Another problem with such information is that anecdotes rarely reveal whether discrimination was the true reason behind a woman's failing to receive a particular job—and workplace segregation makes it harder to unearth the true reason. As Judge J. Skelley Wright noted two decades ago, "[t]he days of Bull Connor are largely past; discrimination now works more subtly."⁸¹ Because antidiscrimination laws by now are well-known, discrimination has gone underground; "'employers are rarely so cooperative as to include a notation in the personnel file' that the firing is for a reason forbidden by law."⁸² Absent such a smoking gun, discrimination is most provable when there are directly comparable male and female candidates whom the employer treated differently.⁸³ But often there is no one directly comparable. "[T]he more segregated the labor force, the more difficult it is to find comparative evidence illustrating discriminatory, disparate treatment."⁸⁴ As discussed elsewhere, many workplaces and occupations are heavily gender-segregated,⁸⁵ so an employer faces "the choice . . . between a male and a female candidate . . . less often than one would think."⁸⁶

It is especially hard to spot discrimination in certain contexts. In high-wage jobs, evaluations of performance, skill, and qualifications are highly subjective, making it difficult to show that an employer passed up a "better" female or minority worker.⁸⁷ And in "high-skill or knowledge intensive jobs in which the discretionary, skill-based component of work creates substantial difficulty in monitoring individual workers' performance," employers often solve that difficulty by paying "efficiency wages"⁸⁸—above-market wages intended to generate a large applicant pool and make employees more eager.⁸⁹ By design, efficiency wages yield a "surplus of

⁸¹ Segar v. Smith, 738 F.2d 1249, 1278 (D.C. Cir. 1984).

⁸² Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 464–65 (2d Cir. 1989) (quoting Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 638 (5th Cir. 1985)).

⁸³ See, e.g., Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (holding that a Title VII plaintiff may raise the requisite "inference of discrimination . . . by showing that the employer subjected him to disparate treatment, that is, treated him less favorably than a similarly situated employee outside his protected group"); Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 63 (2d Cir. 1997) (holding that a female Title VII plaintiff's prima facie case "may be proven by showing that a man similarly situated was treated differently").

⁸⁴ Moss & Malin, *supra* note 25, at 211 n.93 (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1012 (1991)).

⁸⁵ See *supra* notes 12–13, *infra* note 217, and accompanying text.

⁸⁶ Jolls, *Mandates*, *supra* note 12, at 292.

⁸⁷ See, e.g., Charny & Gulati, *supra* note 34, at 98 (noting that "hard-to-observe, subtle discrimination in high-level jobs . . . is near impossible to prove where the [employment] decision involves a large number of similarly qualified individuals and subjective qualifications").

⁸⁸ *Id.* at 60–61. "So long as the extra benefit in terms of inducing effort or attracting high ability workers is greater than the extra wages, this is a rational profit-maximizing strategy . . ." *Id.* at 75.

⁸⁹ See generally EHRENBERG & SMITH, *supra* note 1, at 359–62 (defining and explain-

equally competent” workers,⁹⁰ challenging the idea that free markets deter discrimination. With surplus labor available, discrimination is cheap, both because it is more difficult to spot and because another worker easily can replace the discriminated-against worker.⁹¹

In cases of discrimination against women based on pregnancy or parental responsibilities, examining employers’ treatment of comparable men is difficult. There is obviously no man directly comparable, and likening pregnancy to a different medical condition is an imperfect comparison.⁹² In cases of discrimination against mothers based on parental responsibilities, a comparison could be made to men with similar responsibilities, but men on average still perform far fewer childcare tasks than do women.⁹³ In sum, job applicants’ knowledge of which employers discriminate is likely to be very limited. Anecdotal knowledge is of questionable accuracy, and it is difficult to know whether a particular termination or failure to hire was based on discrimination.

c. The Lack of Effective Signals of Employer Nondiscrimination: An Unintended Consequence of Judicial Micromanagement of the Workplace

The flip side of discrimination being easy for employers to hide is that nondiscrimination is hard for employers to signal. Employers do not admit discriminating, and “good” employer policies tend to be uninformative recitations of basic law—a peculiar result of increasing legal formalization of equal employment standards. One way for an employer to signal gender fairness would be to publicize its enlightened policies on discrimination, employee leave, and affirmative action. Virtually all major employers have antidiscrimination policies, and while not all have

ing efficiency wages); PINDYCK & RUBINFELD, *supra* note 69, § 17.6, at 616–18 (explaining how the efficiency wage theory can explain the causes of wage discrimination and unemployment); cf. POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.1, at 370 n.4 (noting that above-market payments to an agent is one solution to the “principal-agent” problem).

⁹⁰ Charny & Gulati, *supra* note 34, at 78.

⁹¹ *Id.* at 95 (asserting that “underemployment . . . creat[es] a pool of workers that permits firms to discriminate without suffering economic loss”). More generally, wages that are above-market for any reason—efficiency wages, union contracts, wage laws—create excess labor supply, which allows jobs to be allocated by noneconomic criteria such as nepotism, race, or gender. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.1, at 717.

⁹² A similar problem exists for disability discrimination, which is difficult to prove with comparisons to other employees, both “because of the heterogeneity of the disabled” and because “the non-disabled rarely ask for accommodations the disabled are denied.” Moss & Malin, *supra* note 25, at 211.

⁹³ Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 709 (2000) (drawing on evidence that “[w]orking women . . . continue to perform between two to three times as much housework as men [and] remain overwhelmingly responsible for child rearing”).

maternity leave options or affirmative action measures, those that do often disclose them in job postings.⁹⁴

Increased legal scrutiny of such employment policies, however, has made them a far *less* useful signal than they once were. Recent Supreme Court decisions have induced all major firms, including those that discriminate, to adopt equal employment opportunity ("EEO") policies, essentially creating a judicially imposed "minimum" nondiscrimination policy. Recent decisions and legislation have also set "maximum" elements of EEO policies: the Family and Medical Leave Act ("FMLA") provides a standard employee leave policy under federal law,⁹⁵ and courts have sounded a cautious tone regarding affirmative action,⁹⁶ imposing restrictions likely to limit employers' freedom to maintain or expand affirmative action policies. These trends in externally mandated antidiscrimination measures have made it more difficult for employees to infer anything meaningful about a workplace from its policies.

i. Judicially Set "Minimum" EEO Policies: Case Law Allowing Employers To Use EEO Policies as Affirmative Defenses to Discrimination/Harassment Liability

Over the years since the enactment of Title VII,⁹⁷ major employers have adopted EEO policies, which typically include: (1) promises of nondiscriminatory treatment, (2) affirmative action policies, (3) discrimination complaint procedures, and (4) employee sensitivity/antidiscrimination training.⁹⁸ Increasingly, the Supreme Court has made employers' Title VII liability turn on the quality of their EEO policies.

⁹⁴ See, e.g., NALP DIRECTORY, *supra* note 8 (containing postings from all major corporate law firms that engage in on-campus recruiting of law students and providing numerous examples of employers offering employees maternity and paternity leave). *E.g.*, *id.* at 1286 (Carter Ledyard & Milburn LLP offering "13 weeks paid Maternity Leave"); *id.* at 1284 (Cadwalader, Wickersham & Taft LLP offering "maternity leave"); *id.* at 1285 (Cahill Gordon & Reindel offering "maternity and paternity leave"). A number of firms, however, provide significantly longer parental leave for mothers than for fathers, reflecting and reinforcing the expectation that women are (and should be) the primary caregivers; *e.g.*, *id.* at 1286 (Carter Ledyard & Milburn LLP offers "13 weeks paid maternity leave" but only "1 week paid Paternity Leave"); *id.* at 1292 (Covington & Burling offers "3 months maternity" but only "2 weeks parental" leave).

⁹⁵ 29 U.S.C. §§ 2601–2654 (2000).

⁹⁶ See *infra* Part III.B.1.c.ii.

⁹⁷ 42 U.S.C. §§ 2000e (2002).

⁹⁸ Small businesses are less likely to have formal EEO policies, employee handbooks, or training seminars. But almost all mid- to large-sized businesses have such policies now, even those firms notorious for rampant gender discrimination. Compare, e.g., Morgan Stanley, *Equal Employment Opportunity*, http://www.morganstanley.com/careers/equal_empl.html (2002–03) (last visited Feb. 1, 2004) (asserting that "Morgan Stanley is an equal opportunity employer and does not discriminate on the basis of race, color, religion, gender, sexual orientation, national origin, age, citizenship, disability, marital status, pregnancy, veteran status or any other characteristic protected by law"), with EEOC Letter of Determination, *EEOC v. Morgan Stanley & Co., Inc.*, Charge No. 160-99-0423 (June 5,

In *Faragher v. City of Boca Raton*⁹⁹ and *Burlington Industries v. Ellerth*,¹⁰⁰ the Court placed EEO policies at the heart of the employer's defense in hostile work environment cases. The Court held that an employer is strictly liable for sexual harassment by supervisors *unless* the employer proves "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."¹⁰¹

Immediately after *Faragher* and *Ellerth*, lower courts made clear that an employer goes a long way towards meeting its burden, delineated in the first part of the *Faragher* test, by simply promulgating an antiharassment policy and publicizing it to all employees (absent evidence of a specific need for other prevention or correction measures).¹⁰² Antidiscrimination training for managers and employees can also help an employer meet its burden, especially to the extent that the training directly evidences implementation of an antiharassment/EEO policy.¹⁰³

The year after *Faragher* and *Ellerth*, the Court in *Kolstad v. American Dental Ass'n*¹⁰⁴ created a similar affirmative defense to punitive damages liability applicable to both discrimination and harassment claims. *Kolstad* "insulates an employer from punitive damages liability if it has made 'good faith efforts to enforce an antidiscrimination policy.' This defense requires an employer to establish both that it had an antidis-

2000) (concluding, after investigation including witness interviews, review of subpoenaed documents, and extensive briefing, that Morgan Stanley "subjected . . . a class of . . . female employees . . . to a pattern and practice of discrimination because of their sex . . . [including] disparate treatment regarding compensation, promotions, and terms and conditions of employment," as well as retaliation for reporting discrimination), and EEOC Letter of Determination, EEOC v. Morgan Stanley & Co., Inc. Charge No. 160-A0-2451 (Mar. 7, 2001) (concluding, after investigation of follow-up charges, that Morgan Stanley further "engaged in retaliation and sex discrimination . . . in violation of Title VII" after the first determination issued).

⁹⁹ 524 U.S. 775 (1998).

¹⁰⁰ 524 U.S. 742 (1998). *Faragher* and *Ellerth* were decided simultaneously.

¹⁰¹ *Faragher*, 524 U.S. at 807.

¹⁰² See, e.g., *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999); *Montero v. AGCO Corp.*, 192 F.3d 856, 862 (9th Cir. 1999); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932-33 (7th Cir. 1999). Merely having a sexual harassment policy is not *always* sufficient. See, e.g., *Lancaster v. Sheffler Enters.*, 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998) (denying defendant summary judgment because solely issuing harassment policy to employee is insufficient to establish a reasonable effort to prevent and correct harassment and to enforce the policy when complaints arise).

¹⁰³ See, e.g., *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999) (finding that periodic training sessions for managers on company harassment policies, guidelines, and complaint procedures "establish[ed], as a matter of law, that AutoZone exercised reasonable care to prevent sexual harassment"); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812, 821-22 (W.D.N.Y. 1998) (finding for plaintiff because defendant had no harassment policy at the time of the harassment, made no real response to plaintiff's complaints, and had no mandatory harassment training).

¹⁰⁴ 527 U.S. 526 (1999).

crimination policy and made [a] good faith effort to enforce it.”¹⁰⁵ *Kolstad* echoed the *Faragher/Elterth* pronouncement that company EEO policies carry great weight in Title VII cases: “The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”¹⁰⁶

Thus, the Court has allowed employers to use EEO policies to defuse the significant threat of liability in hostile work environment cases and punitive damages in all kinds of discrimination cases. The Court thereby has increased the incentive for employers to adopt the antidiscrimination policies, trainings, and grievance procedures that are standard fare in corporate EEO policies.¹⁰⁷

While genuine antidiscrimination efforts certainly benefit employees, Susan Sturm has noted “the risk that employers will adopt legalistic, sham, or symbolic internal processes that leave underlying patterns of bias unchanged.”¹⁰⁸ For example, “[m]any of the internal dispute resolution mechanisms developed by employers . . . consist of boilerplate from the most recent decisions of the court or the reproduction of EEOC guidelines.”¹⁰⁹ Virtually all law firms, for instance, publish identical-sounding EEO policies, with standard promises of equal treatment and assertions of nondiscriminatory decisionmaking.¹¹⁰ This seems to be enough to protect employers from liability, as “[s]ome courts have deferred to an employer’s procedures, regardless of their actual effective-

¹⁰⁵ *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 385–86 (2d Cir. 2001) (quoting *Kolstad*, 527 U.S. at 546) (citations omitted) (holding that employer failed to establish a *Kolstad* defense where it did “not establish as a matter of law the existence of such a policy, much less good faith enforcement of such a policy”).

¹⁰⁶ *Kolstad*, 527 U.S. at 545.

¹⁰⁷ See, e.g., *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002) (affirming the district court’s refusal to allow a jury to award punitive damages against Bally’s which was shielded by its “good faith effort to prevent sexual harassment . . . , as is evidenced by the fact that [it] had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs’ complaints”).

¹⁰⁸ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 490 (2001). Susan Bisom-Rapp has recounted defense attorneys’ efforts “to strategically position employers” to protect them from litigation and the frequency of “symbolic rather than substantive” compliance with EEO law. Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 961, 963, 965, 966 (1999) (presenting a “content analysis of the defense literature advocating preventative practices” and exposing the creation of an “appearance of nondiscriminatory decision making without an equivalent emphasis on facilitating substantive change for protected groups. In other words, the defense bar speaks to employers in symbolic terms.”).

¹⁰⁹ Sturm, *supra* note 108, at 543.

¹¹⁰ See, e.g., NALP DIRECTORY, *supra* note 8, at 1293 (“It is the policy and practice of Cravath, Swaine & Moore LLP to provide equal employment and advancement opportunities to all persons without regard to race, color, creed, sex, sexual orientation, age, national origin, marital, parental or veteran status or physical disability.”). Almost all firms in the Directory have virtually identical statements. See *id. passim*.

ness in eliminating . . . discrimination. . . . [This] uncritical acceptance of internal dispute resolution processes legitimates purely formalistic solutions”¹¹¹

In light of this case law, an employer’s tough-sounding EEO policy might signal deep concern for equality, but it might also be simply a tactical decision, adopted on advice of counsel and designed to protect the employer from liability. In fact, the *more* discrimination at a firm, the more lawsuits it can expect to face, and thus the greater the “return on investment” for paying pricey lawyers to draft an EEO policy satisfying *Kolstad* and *Faragher/Ellerth*. The worst discriminators therefore have the greatest incentive to adopt the best-sounding EEO policies. Given the likelihood that the most nondiscriminatory and the most discriminatory firms will have similar-sounding EEO policies, such policies can no longer serve as useful signals of employers’ concern for equality.

ii. Judicially Set “Maximum” EEO Policies: Judicial Proscription of Workplace Affirmative Action

In direct contrast to the minimum EEO policies set by decisions such as *Kolstad* and *Faragher/Ellerth*, the limitations courts have imposed on affirmative action¹¹² can be considered a maximum limit on employers’ EEO policies and efforts. The Supreme Court has narrowed the circumstances in which affirmative action is permissible,¹¹³ and attorneys for

¹¹¹ Sturm, *supra* note 108, at 537–58.

¹¹² See, e.g., Pompien, *supra* note 48, at 560–61 (recounting, before the 2003 Supreme Court affirmative action decisions, judicial restrictions on affirmative action and noting that “[g]eneral evidence of discrimination or of stereotypes that persist within society as a whole, or even within a national industry, is necessarily insufficient” to be the “invidious grounds” on which an affirmative action policy can be based); Adams, *supra* note 58, at 1122–52 (reiterating such insufficiency and adding that affirmative action has been held impermissible even in such limited forms as regulations mandating outreach programs or aggressive litigation remedies).

¹¹³ In 1996, the Supreme Court held that governmental affirmative action based on race faces strict scrutiny and therefore must be narrowly tailored to serve a compelling governmental interest. See *Adarand v. Peña*, 515 U.S. 200, 227 (1996). Subsequent appellate court decisions invalidating affirmative action programs were followed by *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), both challenges to the University of Michigan’s programs for affirmative action in student admissions. *Gratz* invalidated the undergraduate affirmative action program, deeming that it went too far in assigning applicants a substantial number of admissions points based on race. 539 U.S. 281–83. *Grutter*, in contrast, upheld the law school affirmative action program, which considered applicants on a more individualized basis. 539 U.S. 336. *Grutter*’s permissiveness may be narrowly limited to the academic setting, since the Court asserted that the principle of academic freedom contributed to its deference to the University. See Frank Scruggs & Joe Reeder, Greenberg Traurig, LLP, *Supreme Court Decisions in the University of Michigan Affirmative Action Cases Have Important Implications for Employers, Federal Contractors, and Institutions Across the Fabric of American Life* (July 2003), available at http://www.gtlaw.com/pub/alerts/2003/scruggsf_07.asp (last visited Feb. 1, 2004).

employers are advising their clients to exercise caution in adopting any affirmative action policies and to review carefully any current programs.¹¹⁴

Before the Supreme Court began to restrict affirmative action, employers could send particularly clear signals of concern for equality by engaging in aggressive affirmative action. Affirmative action could increase female and minority hiring by drawing more women or minorities from the applicant pool, but it could also have dynamic effects. Affirmative action can induce more women and minorities to apply because it is "a valuable means of signaling to potential applicants" the employer's "high value on diversity."¹¹⁵ Thus, as voluntary affirmative action becomes rarer due to the Supreme Court's restrictions, another formerly useful signal to job applicants concerned about gender discrimination is vanishing.

The irony here is that the judicial declarations of minimum and maximum EEO policies are purportedly conservative policies, in the sense of limiting employers' liability for inequality and responsibility to redress it. Yet these precedents heavily regulate and distort employers' decisions about how to run their workplaces. Where there once existed a wide range of antidiscrimination and affirmative action policies, there is now a judicially imposed set of workplace rules. While serving the conservative goal of minimizing employer liability, these decisions fly in the face of the older conservative exhortation that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."¹¹⁶ Indeed, when courts reject employment discrimination claims, they regularly invoke just these sorts of old bromides, such as the admonition that courts not serve as "super-personnel departments," monitoring employment decisionmaking.¹¹⁷ When constructing liability shields for employers, how-

¹¹⁴ E.g., Scruggs & Reeder, *supra* note 113 (predicting that "some organizations now may forebear from adopting [affirmative action] . . . [or] use these decisions carefully to assess potential liabilities and to refine their policies"), available at http://www.gtlaw.com/pub/alerts/2003/scruggsf_07.asp; Jackson Lewis LLP, *Court Rulings Stress National Importance of Diversity Goals but Set Limits on Methods* (June 24, 2003) (noting that the "Supreme Court leaves unanswered whether courts will continue to hold that affirmative action or diversity preferences . . . in the employment context can be implemented *only* to remedy past or present discrimination" and cautioning employers that "[a]ffirmative action or diversity programs that provide financial incentives or rewards to managers for diversity successes are particularly at risk"), available at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=423> (last visited Feb. 1, 2004).

¹¹⁵ Pompian, *supra* note 48, at 556.

¹¹⁶ *Waters v. Furnco Constr. Co.*, 438 U.S. 567, 578 (1978).

¹¹⁷ E.g., *Traylor v. Brown*, 295 F.3d 783, 790 (7th Cir. 2002) (noting that "we do not sit as a super-personnel department over employers scrutinizing and second-guessing every decision they make"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination").

ever, many courts remain aggressive micromanagers unconcerned about judicial intrusion into workplace policy.

iii. Legislation Setting a Standard Package of Accommodations

Oddly, employers' abilities to signal their fairness to job applicants are diminished not only by judicial decisions *limiting* employer responsibility for workplace inequality, but also by legislative enactments *increasing* employer responsibility for workplace inequality. The FMLA, for example, mandates up to twelve weeks of unpaid leave for an employee who has a "serious medical condition" or is caring for a relative with such a condition.¹¹⁸ The FMLA covers both men and women but was expressly conceived as an effort to force employers to accommodate women in the workplace¹¹⁹ by allowing them to return to jobs after taking time off for pregnancy, caregiving, and homemaking responsibilities that women, even when they also work outside the home, continue to undertake more often than men.¹²⁰

The FMLA, however, may not have raised the floor of employee leave benefits for some employees, and it may have set an unofficial ceiling. Michael Selmi has noted that before the FMLA, employee leave benefits were common but quite varied; federal survey data show that "a majority of large employers . . . provided some form of leave before the passage of the FMLA . . . to take time off around the birth of a child."¹²¹ The most common forms were paid sick leave, unpaid maternity leave, and disability plan coverage for pregnancy.¹²² Some firms offered benefits well above the FMLA minimum: employees working in medium- to large-size companies for at least five years received an average of nine weeks of fully paid leave.¹²³ In addition, some states mandated leave benefits more generous than the FMLA's, including wage replacement during leave.¹²⁴

¹¹⁸ 29 U.S.C. § 2612(a) (2003).

¹¹⁹ As delineated in 29 U.S.C. § 2601(b) (2004), the purposes of the FMLA are not only to help employees "balance the demands of the workplace with the needs of families" (§ 2601(b)(1)) and take time off for "medical reasons" (§ 2601(b)(2)) but also to "minimize the potential for employment discrimination on the basis of sex" (§ 2601(b)(4)) and "promote the goal of equal employment opportunity for women and men" (§ 2601(b)(5)). Even the family and medical purposes (§§ 2601(b)(1),(2)) reflect gender equity goals, as the statute's "Findings" make clear: "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5) (2004).

¹²⁰ See *supra* note 93 and accompanying text.

¹²¹ Selmi, *supra* note 93, at 762.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 763.

Thus, before the FMLA, a firm's generous family/pregnancy leave provisions could serve as a useful signal of genuine efforts to facilitate the entry and retention of female employees. The FMLA's passage, however, raised the less sensitive employers' leave policies up to a statutory minimum. As a result, such firms' inclination to offer stingy family/pregnancy leave is no longer readily apparent, eliminating another potential signal to workers concerned about gender equity.

While the FMLA increased family/medical leave rights in some workplaces, it

may also have preempted the development of more friendly policies in the private sector. Prior to the . . . FMLA, there appeared to be a modest trend by private employers to provide increasingly generous paid leave policies, a trend that now seems to have stalled as the federal legislation has become the ceiling of benefits.¹²⁵

In fact, the enactment of the FMLA has resulted in family leave reform vanishing from legislatures' and unions' agendas.¹²⁶ Except for California, which in 2002 passed a law mandating paid leave, no state has passed significant legislation since the FMLA's enactment, and the relevant potential lobbies have been "likely to move on to other issues."¹²⁷

To the extent that it has preempted or slowed any trend by firms, unions, or states to provide more generous leave, the FMLA has in effect imposed an unofficial ceiling limiting what many employers might come to provide. By creating a mandatory floor and an unofficial ceiling on employee leave benefits, the FMLA has diminished the range of variation among firms' leave policies, thereby lessening such policies' value as signaling mechanisms.

iv. Employer Signals Reduced to "Cheap Talk"

As discussed above, employers' EEO, affirmative action, and family/medical leave policies no longer serve as effective signals of employer fairness. The resulting information problem for employees is similar to a long-noted information problem for employers: because employee talent and effort is hard to discern in advance, employers end up skeptical of the "large number of noisy and false signals"¹²⁸ from employees. The result is a "pooling equilibrium":¹²⁹ even though employees vary, employ-

¹²⁵ *Id.* at 767.

¹²⁶ *Id.* at 766.

¹²⁷ *Id.*

¹²⁸ Charny & Gulati, *supra* note 34, at 82.

¹²⁹ *Id.*

ers assume each new employee to have about the same talent and work ethic as the average worker in the labor pool.¹³⁰

Similarly, employer policies have degenerated from useful employer signaling to a form of “cheap talk”—boasts that are “profitable because of the low odds of being caught and the immense gain in respectability (and legality)” of claiming fairness.¹³¹ Employee assessments of employers’ fairness have, as a result, degenerated into a pooling equilibrium, with employees assuming that one employer has about the same odds of discriminating as another.

2. The Solution to Women’s Information Problem: Using the Percentage of Women in a Workplace as a Proxy for Employers’ Treatment of Women

As previously discussed, in recent years both overt discrimination and variation among employers’ EEO, affirmative action, and employee leave policies have decreased, reducing their signaling value to employees. Thus, women must utilize other criteria to predict which occupations or particular employers are more likely to treat female employees well.

One such criterion that female job applicants can employ is the percentage of a workforce that is female¹³²—a figure that can serve as a proxy for the presence of discrimination. In several ways, the number of women in a workplace correlates to the likelihood of gender discrimination. First, and most obviously, discriminatory hiring and promotion practices may be the reason there are few women in a given workplace. Second, hostile work environments are far more likely in workplaces with fewer women. And third, even absent conscious discrimination or hostility, workplaces with fewer women are more likely to feature gendered norms favoring men and to advantage men in other subtle but important ways.

¹³⁰ See POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.5, at 726 (discussing how a pooling equilibrium, in which employers judge employees by race, can occur in the context of racial preferences if higher-performing employees find it “difficult to separate themselves” from lower-performing employees); ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 194–99 (1992) (discussing circumstances in which workers’ job-market signaling yields a pooling, or “partially pooling,” equilibrium).

¹³¹ Moss & Malin, *supra* note 25, at 203; *see generally* ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 96–113 (discussing signaling generally and how signals can degenerate into “cheap talk” if easy to fake); GIBBONS, *supra* note 130, at 210–13.

¹³² Sturm has collected examples of just such behavior. Sturm, *supra* note 108, at 497–98 (recounting that reform at Deloitte & Touche, the nation’s third largest accounting, tax, and management consulting firm, which dramatically increased the female percentage of its workforce, “produced swift and observable results, both in women’s participation and in the firm’s overall retention rate[.] . . . [and] has itself become an effective recruiting tool”); *id.* at 514 (recounting that at Home Depot, before reforms spurred by a class action lawsuit, women gravitated toward positions more populated by women, such as cashier jobs, because, in the words of one woman, “I thought that’s where women went”).

a. The Rationality of the Assumption That Discrimination May Have Caused the Underrepresentation of Women

Female job applicants may see gender disparities among workplaces, but they may not know why such disparities exist. One reason could be that the firms with fewer women discriminated against women in hiring and promotions. This commonsense point is reflected in the case law viewing significant underrepresentations of women as *prima facie* evidence of discrimination.¹³³ Another possibility is that because women still bear disproportionate childcare responsibilities,¹³⁴ they opt against certain work requiring extremely long hours.¹³⁵ Joan Williams argues that failing to accommodate childcare responsibilities may be a form of discrimination;¹³⁶ yet even if it does not constitute judicially recognized "discrimination," it is still a form of inhospitality to women.

Another possible cause of workplace gender disparities is unequal attrition, even absent any hiring discrimination. If an employer hires equal numbers of men and women, but women have higher attrition rates, that workforce will become male-dominated over time. Hostile work environments and other intangible discriminatory acts, such as discriminatory evaluations, are one reason for higher female attrition; in male-dominated workplaces, hostility to female workers may subvert women's performance or otherwise induce women to leave.¹³⁷

Gender disparities also may arise from random chance or nondiscriminatory causes, but applicants may not know whether a specific underrepresentation resulted from discrimination. Yet because discrimination is a possible cause, it is rational, given their uncertainty, for women to avoid workplaces with underrepresentations of women.

b. The Reverse of the Basic Assumption That Discrimination Causes Disparities: Disparities Cause Discrimination

When a gender disparity exists, women may rationally assume that discrimination caused the disparity. Yet the opposite is true as well: a lack of women in the workplace can cause, or at least facilitate, discrimination. In predominantly male workplaces, stereotyping women as incapable of performing "men's work" is more frequent, hostile work environments are more common, and subjective, informal decisionmaking favoring men over women is more likely. To the extent that gender dis-

¹³³ See *infra* Part VI.A.1.a.

¹³⁴ See Selmi, *supra* note 93, at 709, 729.

¹³⁵ See *infra* text accompanying notes 243–247 (discussing WILLIAMS, *UNBENDING GENDER*).

¹³⁶ See Williams & Segal, *supra* note 80, at 90–102.

¹³⁷ See *supra* Part II.B.2.b.

parities cause discrimination, avoiding male-dominated workplaces is a rational strategy for female job applicants.

i. The Ease of Stereotyping in Traditionally Male Jobs and the "Lack of Interest" Defense

When states prohibited women from practicing law, it was easy for the Supreme Court to reject a Fourteenth Amendment challenge to the Illinois ban on women attorneys because "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."¹³⁸ The Illinois law and other similar state laws prevented any women from becoming counterexamples and thus from disproving that stereotype. Many have viewed stereotyping exactly this way—as a result of inaccurate information that lessens in diverse settings, where those holding inaccurate stereotypes are exposed to counterexamples.¹³⁹

Economists tend to view discriminatory preferences—*distaste* for other groups—as a distinct phenomenon from stereotyping, and they assume tastes are fixed, not the product of current conditions.¹⁴⁰ An alternative view of discriminatory preferences is that they are a product of living in a nondiverse environment and can change as the environment changes. Noneconomic analyses long have noted that desegregation decreases prejudice.¹⁴¹ Even economic analysis is capable of analyzing bigotry as an "information market failure[.]" Under this view, people's perceptions are skewed because they receive and selectively process biased information.¹⁴² These biased perceptions can then produce and reinforce bigoted

¹³⁸ *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring).

¹³⁹ See, e.g., Barbara Reskin, *Feminist Justice, at Home and Abroad: Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEM. 313, 324 (2002).

¹⁴⁰ E.g., Moss & Malin, *supra* note 25, at 201–08 (discussing the standard economic account of discriminatory preferences, discrimination based on perceptions of actual group differences, and ways in which those perceptions may be inaccurate stereotypes).

¹⁴¹ E.g., MARTHA MINOW, NOT ONLY FOR MYSELF 127 & n.599 (1997) (asserting that "the literature on the efficacy of racial desegregation programs concludes that reduction of racial prejudice is most affected by significant contact with members of other groups "under conditions of equal status that emphasize common goals and deemphasize individual and intergroup competition." Important kinds of contact include group academic projects and shared membership on athletic teams Such joint activities are more effective than instructing teaching about race relations and changing the curriculum to reflect multicultural traditions, although such measures might also be useful." (quoting John B. McConehay, *Reducing Racial Prejudice in Desegregated Schools*, in EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY 35 (Willis D. Hawley ed., 1981)).

¹⁴² See *supra* note 66 (discussing these biases and how they can produce inaccurate stereotypes).

views.¹⁴³ Thus, a lack of diversity may reinforce not only inaccurate stereotypes but pure bigotry as well.

One example of disparities facilitating stereotypes is the success of the "lack of interest" defense used by employers charged with discrimination. Schultz has collected examples of courts adopting stereotypes that (in the words of one federal judge) "certain work . . . is not attractive to females. This is a fact of life that an Act of Congress cannot overcome."¹⁴⁴ Numerous courts have accepted employers' arguments that women are underrepresented in higher-paying work not because of discrimination but because women lack interest in traditionally male jobs such as retail sales,¹⁴⁵ bakery operations,¹⁴⁶ and manufacturing.¹⁴⁷ In the leading "lack of interest" case, *EEOC v. Sears, Roebuck & Co.*,¹⁴⁸ the court accepted the employer's assertions "that the gendered characteristics Sears ascribed to the commission sales position were an inherent, necessary part of the job."¹⁴⁹ Sears's male-biased criteria reflected the characteristics of the existing male-dominated workforce; the absence of women from the workforce meant that they would be disfavored for not matching the prevailing archetype of a commissioned salesman.

Even partial exclusion facilitates stereotyping by allowing exceptions to be written off as special cases, as in the Supreme Court decision upholding a state's ban on women practicing law.¹⁵⁰ Furthermore, due to stereotype threat,¹⁵¹ it is hard for a woman in a male-dominated workplace to excel as an "exception," further decreasing the likelihood of dispelling stereotypes in such a workplace.

¹⁴³ Moss & Malin, *supra* note 25, at 208 (citing Francis Kim, *Discriminatory Tastes: Social Darwinism and Discrimination in the Labor Market* (1997) (unpublished manuscript)).

¹⁴⁴ *EEOC v. Mead Foods, Inc.*, 466 F. Supp. 1, 3 (W.D. Okla. 1977). The court accepted a bakery's failure to employ women on the rationale that the "hours and the nature of the work are not appealing to women. In the less demanding work environments than the baking operation and route service, Defendant's work force is generally heavy with women . . ." *Id.* at 3-4; *see also* Schultz, *Telling Stories*, *supra* note 29, at 1784 (discussing *Mead Foods*, 466 F. Supp. at 1).

¹⁴⁵ *See EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

¹⁴⁶ *See supra* note 144 (discussing *Mead Foods*, 466 F. Supp. at 1).

¹⁴⁷ *See EEOC v. Korn Indus.*, 17 Fair Empl. Prac. Cas. (BNA) 954 (D.S.C. 1978), *aff'd on other grounds & remanded*, 662 F.2d 256 (4th Cir. 1981); *see also* Schultz, *Telling Stories*, *supra* note 29, at 1784 (discussing *Korn Industries*, 17 Fair Empl. Prac. Cas. (BNA) at 954).

¹⁴⁸ *Sears*, 628 F. Supp. at 1264.

¹⁴⁹ Schultz, *Telling Stories*, *supra* note 29, at 1805. Interestingly, the "gendered characteristics" at issue reflected a stereotype of *men*. "Questions asked include: 'Do you have a low pitched voice?' 'Do you swear often?' 'Have you ever done any hunting?' 'Have you played on a football team?'" *Sears*, 628 F. Supp. at 1300 n.29.

¹⁵⁰ *See supra* note 138 and accompanying text.

¹⁵¹ *See supra* Part II.B.2.b.ii.

ii. *The Prevalence of Hostile Work Environments in Traditionally Male Jobs*

The fewer women in a workplace, the more likely it is that the work environment will be hostile to women. The problem is greatest for women entering male-dominated occupations, as Schultz has noted.¹⁵² The hostility often “is neither driven by the desire for sexual relations nor even sexual in content”; rather, it is “designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority.”¹⁵³ Harassment thus can stem from men’s desire to preserve male-dominated fields by both driving out women who enter (with hostility, sabotage, etc.) and marking the work as male territory (with sexual images and indicia of male-dominated culture).

Michelle Adams has elaborated on the general principle of social psychology that dominant-group members “often allocate resources to those within their group and discriminate against outgroup members because to do so contributes to their own individual self-conception.”¹⁵⁴ Social psychology theories such as “social identity theory” emphasize the tendency to favor one’s own group, which helps dominant groups perpetuate their power.¹⁵⁵ Other theories focus on darker motivations, such as “realistic-group-conflict theory” (i.e., groups have incompatible goals and compete for scarce resources)¹⁵⁶ and “social dominance theory” (i.e., groups aim to protect their privilege, power, and prestige).¹⁵⁷ Despite their differences in focus, each of these theories helps explain the prevalence of hostility to women in male-dominated workplaces.

High female attrition is the predictable result of hostility to women in predominantly male workplaces.¹⁵⁸ As Schultz has described the phenomenon, “harassment is . . . driving the small number of women in nontraditional jobs away.”¹⁵⁹ Like other discrimination, harassment is a “powerful disincentive for women to move into and remain in nontraditional occupations.”¹⁶⁰ Thus, even if a gender disparity did not result from discrimination, it can lead to discriminatory outcomes.

A strategy of gender-based hostility aimed at excluding women is more feasible and more likely to succeed where women are already underrepresented, sometimes even despite the presence of women in positions of authority. Presumably, women with authority would be less likely to

¹⁵² Schultz, *Telling Stories*, *supra* note 29, at 1834.

¹⁵³ Schultz, *Harassment*, *supra* note 43, at 1687.

¹⁵⁴ Adams, *supra* note 58, at 1152.

¹⁵⁵ *Id.* at 1100–04.

¹⁵⁶ *Id.* at 1104–06.

¹⁵⁷ *Id.* at 1107–09.

¹⁵⁸ See Schultz, *Telling Stories*, *supra* note 29, at 1825 & n.286 (citing mobility studies showing higher female attrition from higher-paying, male-dominated occupations).

¹⁵⁹ *Id.* at 1834.

¹⁶⁰ *Id.* at 1825.

tolerate gender discrimination and harassment. However, in male-dominated workplaces, the few women who make it to the top may spend little effort improving conditions for future women.¹⁶¹

iii. Subjective and Informal Decisionmaking That Favors Men

An additional problem in male-dominated workplaces is what might be called "soft" discrimination—social networks favoring men and other dominant groups in a workplace. Specifically, selection criteria that tend to favor men, as well as word-of-mouth hiring and other informal decisionmaking processes, reinforce gender disparities even absent any intent to discriminate.¹⁶² The classic example is the interviewer who begins job interviews with questions aimed at determining whether the interviewer and the applicant know people in common. Interviewers ask such questions, in the words of one interviewer at a major hiring conference, "to see if [the applicants are] the same species" as the incumbents.¹⁶³

¹⁶¹ See, e.g., Jones, *supra* note 63, at 19–20 (citing a survey of female lawyers at a predominantly male law firm which reported "a belief among the associates that the women who did achieve partnership did little to promote the opportunities and quality of life of other women at the firm"). This phenomenon occurs in other settings as well. Susan Dominus notes the comment by one female cadet regarding the numerous rapes reported at, but essentially ignored by, the U.S. Air Force Academy:

Because women are a minority here, it's also important to see role models . . . I would point to a failure of the female leadership . . . [The top-ranking woman] was not visible. She never addressed the cadet wing; she just disappeared. I would have said, "We cannot accept this." But that never happened. And we need a female role model who can provide good leadership.

Susan Dominus, *Rape Crisis at the Academy*, GLAMOUR, July 2003, at 200, 217 (alteration in original).

¹⁶² See, e.g., Adams, *supra* note 58, at 1135 & n.287 (noting that word-of-mouth recruiting may signal an "old boys' network" that gives limited opportunities to traditionally excluded groups "by reaffirming the perception that a particular firm is dominated by members of a particular group"); Schultz, *Telling Stories*, *supra* note 29, at 1813 (asserting that "[w]ord-of-mouth recruiting signals to women that they would be unwelcome in an occupational culture so masculinized that the employer relies on male employees to recruit new workers through mostly male networks"); cf. Banks v. City of Albany, 953 F. Supp. 28 (N.D.N.Y. 1997) (denying a defendant summary judgment on a claim that a fire department's subjective hiring practices, based on personal ties, had a disparate impact on black candidates).

¹⁶³ These were the words of a middle-aged white male law professor at the October 2003 American Association of Law Schools ("AALS") Faculty Recruitment Conference. The professor made this comment to a gathering of hundreds of applicants for law faculty positions, as part of an AALS presentation purporting to explain the faculty hiring process to applicants. If this professor is correct that shared connections are a hiring criterion, it is perhaps unsurprising that women, though fairly well-represented among legal educators, are significantly underrepresented in traditional (and coveted) tenure-track faculty positions filled through this AALS Faculty Recruitment Conference. See AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE OF WOMEN IN THE LAW 2 (2001) (citing that women comprise 31.5% of law school faculties, but only 5.9% of tenured faculty members and 21.9% of full-time professors, while making up 46% of associate professors and 48% of assistant professors), available at <http://www.abanet.org/women/>

Male decisionmakers may tend to select job applicants and employees to mentor based on preexisting contacts and various commonalities with those employees that correlate with gender. This has been the experience of women in the legal profession, for example, where “[w]omen are often not mentored, and are frequently not included in important informal and social contacts. *This is particularly true in firms with few women.*”¹⁶⁴ Similarly, white dominance is reinforced, Daria Roithmayr has noted, by selection criteria that correlate with race, such as standardized testing, cultural experiences, and informal contacts. Decisionmakers perceive these measures to have nondiscriminatory utility as reasonably good selection criteria—at least good enough to outweigh the “switching costs” of changing the process.¹⁶⁵

In the context of gender, the problem is not so much tangible selection criteria, such as standardized testing and educational attainment, but the subjectivity and informality of many employment decisions. Choices among candidates ultimately entail a great deal of discretion—especially to the extent that there is a surplus of similarly qualified candidates, whether because of a depressed local economy or above-market efficiency wages attracting a deep applicant pool.¹⁶⁶ Once employees are on the job, a substantial amount of training and mentoring is informal. Schultz has noted that this is true of “virtually all training” in traditionally male blue-collar jobs,¹⁶⁷ and it is just as true in many white-collar fields as well.¹⁶⁸

glance.pdf (last visited Feb. 1, 2004); Steinberg, *supra* note 80, at 274 (noting how legal academia operates its conferences like “an exclusive country club” rather than “developing an inclusive community”).

¹⁶⁴ Jones, *supra* note 63, at 29 (emphasis added). She explains:

[T]he ABA Commission on Women in the Profession concluded that law firms discriminate against women in a number of ways. For example, women have fewer mentoring opportunities than do their male counterparts in the law firm setting Additionally, women are less likely to be included in the social events that build collegiality within the firm.

Id. at 27–28; *see also id.* at 19 (citing surveys of female lawyers at major firms that found that “[m]entoring was not equally available to women” and “[b]usiness development, essential to partnership, occurred mostly in male-oriented settings”).

¹⁶⁵ Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 775–80 (2000).

¹⁶⁶ *See supra* notes 88–91 and accompanying text (discussing efficiency wages).

¹⁶⁷ Schultz, *Telling Stories*, *supra* note 29, at 1835.

¹⁶⁸ *See, e.g.,* David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1235–36, 1239 (2001). In elite law firms, “[o]ne must be trained, and in order to receive training one needs a mentor.” *Id.* at 1222.

Most associates . . . are capable of working hard and producing work of high quality. In order to demonstrate these qualities, however, one must gain access to good work and training opportunities, both of which are in short supply Linking up with a Senior Mentor . . . [is a] way[] in which an associate might try to gain access to these vital but scarce developmental opportunities.

Not only does this informality facilitate actual discrimination, it also favors workers who happen to share natural ties and affinities with existing decisionmakers. Social contacts are invaluable in many fields as a way "to form relationships with powerful incumbents";¹⁶⁹ in fact, part of the benefit of an education at an elite institution is developing crucial professional contacts.¹⁷⁰ Shared "cultural knowledge" is often important for workers hoping to bond with, and be viewed as successful by, those incumbents.¹⁷¹

These cultural advantages are usually not considered discrimination within the limited definitions of current antidiscrimination laws. An employer has not violated Title VII, for example, because an employee gained informal knowledge and contacts by belonging to the same country club as the employer's white male officers, or because the white male employee's upbringing works to his advantage in interviews with (or workplace schmoozing of) white male decisionmakers. However, the effect is much the same as overt discrimination: the in-group worker gains very real advantages for reasons entirely divorced from the worker's merit as an employee. In short, subjective and informal decisionmaking leaves in place the "old boys' network" of male decisionmakers selecting and grooming male employees. This is an illustration of the prediction of social identity theory:¹⁷² whether consciously discriminating or not, empowered groups will maintain their power by favoring their own members.

The problem is a circular one because the relevant contacts and cultural knowledge come in large part from the workplace, but the lack of those contacts and knowledge is a barrier to workplace entry and success. If the entire workforce, including workplace decisionmakers, were evenly

Id. at 1235-36. Mentors are "in a position to give associates access to scarce training resources and because they provide their proteges with political support within the partnership as well as connections to important clients." *Id.* at 1239.

¹⁶⁹ Adams, *supra* note 58, at 1152.

¹⁷⁰ POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.2, at 717-18 (noting that the Supreme Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), recognized that lack of contacts was a problem for segregated schools).

¹⁷¹ See Roithmayr, *supra* note 165, at 782 (asserting that legal education favors "incumbent whites [who] likely possess the equivalent of cultural 'know-how' to create the culturally specific performance valued by the market"). More generally, one form of in-group advantage is the "attraction-selection-attrition cycle":

First, people are differentially attracted to an organization based on the organization's existing culture and personality Second, the organization's hiring process will select individuals who are compatible with the organization's culture and personality. Finally, individuals who are not compatible with the organizational culture, and have not been successfully socialized to that culture, will leave eventually, . . . [and] those who remain behind will constitute an even more homogeneous group"

Id. at 772-73.

¹⁷² See *supra* notes 154-157 and accompanying text (discussing Adams's social psychology theory of discrimination).

divided between men and women, men would possess no advantage in contacts or culture; even if contacts and culture split somewhat along gendered lines, new female workers would have just as many ties to female decisionmakers as new male workers have with male decisionmakers.¹⁷³ Because fewer decisionmakers are female, however,¹⁷⁴ new male workers have contacts and cultural advantages that would not exist absent current gender disparities.

IV. A DYNAMIC MODEL OF PREFERENCES FOR DIVERSITY: INITIAL INTEGRATION FAILS TO ELIMINATE SEGREGATION

This Part sets out a model of how women's preference for diversity can lead to increased occupational segregation, even as more women enter the labor force. Though nonquantitative, this model is deeply rooted in economics; its premise is rational, strategic decisionmaking, and it presents a dynamic analysis that considers how one change causes subsequent adjustments, and so on.¹⁷⁵ In labor economics, dynamic analyses can yield surprising yet accurate predictions because they consider how changed circumstances affect workers' expectations and thus affect whether or not they enter a field or particular workplace.¹⁷⁶

The model in this Part assumes that the labor market entirely excludes women at first. Then, only certain fields, and certain specific firms,

¹⁷³ I do not mean to imply that it would be an acceptable form of "equality" to have an evenly split workforce in which men only mentored men and women only mentored women. Such a state of affairs would be a troubling continuation of group-based favoritism in an otherwise "equal" workforce.

¹⁷⁴ This will almost always be the case for women of color, or people of color generally, even if they achieve proportional representation throughout the labor market. Although women are more than half of the population, U.S. CENSUS BUREAU, 2000 CENSUS SUMMARY FILE: AGE GROUPS AND SEX (2000) (women were 50.9% of the U.S. population in 2000), available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_QTP1&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-_sse=on (last visited Feb. 1, 2004), people of color are less than one-quarter of the population, U.S. CENSUS BUREAU, 2000 CENSUS SUMMARY FILE: RACE ALONE OR IN COMBINATION (2000) (non-whites were 22.9% of the U.S. population in 2000), available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_QTP5&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-_sse=on (last visited Feb. 1, 2004). Even if proportionally represented throughout the workforce, people of color would still constitute less than one-quarter of the workforce decisionmakers. Thus, the work-force situation for women of color, or for people of color generally, may be even more resistant to improvement than that for women generally.

¹⁷⁵ See POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 3.1, at 36 ("[T]he economist's distinction between static and dynamic analysis [is that] [s]tatic analysis suppresses the time dimension of economic activity: All adjustments to change are assumed to occur instantaneously Dynamic analysis, in which the assumption of instantaneous adjustment to change is relaxed, is usually more complex").

¹⁷⁶ See, e.g., EHRENBERG & SMITH, *supra* note 1, app. 9A at 301-04 (setting out a "cobweb model" of workers' choices among different fields, in which workers flock to fields experiencing economic boom and avoid fields experiencing economic bust).

start including women. The employers that begin including women will find themselves with more female job applicants, beginning a dynamic process yielding a counterintuitive result: even as more women enter the workforce, making the overall workforce more integrated, occupational segregation increases because the firms initially lagging in integration never catch up, even if they do not discriminate.

A. Initial Conditions: Complete Segregation Followed by Uneven Initial Integration

In this model, at first no women participated in any fields traditionally considered "men's work." Then integration began, but not at the same pace in all fields or firms. Initial integration focused only on certain industries or certain job types for several reasons. First, some firms or industries may be more welcoming of women because "[i]n a market of many sellers the intensity of the prejudice . . . will vary."¹⁷⁷ Second, some jobs may conflict less with long-standing stereotypes of women's proper role (e.g., the wide range of caregiving occupations that are more than ninety-five percent female, in contrast to the physical labor occupations that are more than ninety-five percent male).¹⁷⁸ Third, some firms may be more sensitive to, or successful at, recruiting and including women because of, for example, overtly or subtly "gendered" job postings.¹⁷⁹ Fourth, some firms may be earlier targets of lawsuits or public scrutiny of their exclusionary practices. For example, many law firms faced sex discrimination suits in the 1980s,¹⁸⁰ but many major financial institutions did not face similar suits until the late 1990s and early 2000s.¹⁸¹ Fifth, some male-dominated fields, more dependent on a steady influx of men in their early twenties than others, experienced war-induced labor shortages of

¹⁷⁷ POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.1, at 716.

¹⁷⁸ See Jolls, *Mandates*, *supra* note 12 and accompanying text.

¹⁷⁹ Job postings may discourage women from applying simply by lacking gender-neutral language. Schultz, *Telling Stories*, *supra* note 29, at 1811 & n.233 (citing a study showing that the percent of women interested in the same job was either five percent, twenty-five percent, or forty-five percent, depending on the gender-inclusiveness of ad language). Even when postings have "apparently sex-neutral language," they can discourage female entry by communicating a desire for stereotypically male traits. *Id.* (citing C. COCKBURN, *MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW* 181 (1985)).

¹⁸⁰ See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting a law firm's "freedom of association" argument that it was entitled to discriminate against women in partnership decisions).

¹⁸¹ See, e.g., *EEOC v. Morgan Stanley & Co., Inc.*, No. 01 Civ. 8421, 2002 U.S. Dist. LEXIS 11877 (S.D.N.Y. July 1, 2002) (gender discrimination pattern-and-practice case filed in 2001); *Mitchell v. Metro. Life Ins. Co.*, No. 01 Civ. 2112, 2002 U.S. Dist. LEXIS 4675 (S.D.N.Y. Mar. 21, 2002) (gender discrimination class action filed in 2001); *Martens v. Smith Barney, Inc.*, No. 96 Civ. 3779, 1998 U.S. Dist. LEXIS 22994 (S.D.N.Y. July 28, 1998) (approving the settlement of a gender discrimination class action filed in 1996); *Cremin v. Merrill Lynch Pierce Fenner & Smith*, 957 F. Supp. 1460 (N.D. Ill. 1997) (gender discrimination class action filed in 1996).

men, leading them to bring women into the fold as a matter of economic necessity.¹⁸² Random chance probably also explains some uneven integration; even if all firms face the same stereotypes and incentives, one firm or industry may still find itself with more female workers.¹⁸³

B. Widening of Initial Gender Gaps over Time

Once there is an initially uneven pace of integration, the gender gap may widen due to various forces of labor supply and demand.¹⁸⁴ Specifically, the level of gender diversity affects both female workers' incentives to enter a workplace and employers' incentives to hire women.

1. Labor Supply: Women's Incentives To Enter a Workplace Increase as the Representation of Women Increases

a. The Preference for Diversity: Variation in Intensity of Preference

Women prefer, all else being equal, to work for employers with more female workers,¹⁸⁵ at least when workplaces range from male-dominated to roughly balanced.¹⁸⁶ The model becomes a bit more complicated, but

¹⁸² See Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405, 1468 (2002) (stating that “[t]he exodus of men from the civilian labor force during World War II opened up short-lived opportunities for more women to attend law school and to secure employment in private practice as well as with the government”); Constance Baker Motley, *Remarks at the Thurgood Marshall Commemorative Luncheon*, 62 BROOK. L. REV. 531, 539 (1996) (noting that “[d]uring World War II, when men were drafted into the service and college and graduate school facilities began to lose their student populations, affirmative action programs arose in many such institutions to increase the admission of blacks and women”).

¹⁸³ See, e.g., Roithmayr, *supra* note 165, at 787 (describing that “[i]n a system that is sensitive to initial conditions, even insignificant historical events, born of chance or some minor fluctuation of a system, may have outcome-determinative effects”).

¹⁸⁴ See Jolls, *Mandates*, *supra* note 12, at 233–34.

The supply of labor reflects employees' willingness to work at different wage levels; it slopes upward because employees will generally be willing to work more (provide more worker-hours) if wages are higher The demand for labor reflects employers' demand for worker-hours at different wage levels; it slopes downward because employers will demand fewer worker-hours when wages are higher.

Id. See generally EHRENBERG & SMITH, *supra* note 1, at 36–37 (discussing labor demand); *id.* at 40–42 (discussing labor supply).

¹⁸⁵ See *supra* Part III.B.2. In terms of formal economic modeling, the quantifiable elements of female workers' utility functions include not only money and hours but also the percentage of women in the workplace.

¹⁸⁶ I do not address women's preferences regarding *female-dominated* workplaces, such as those jobs that are more than ninety-five percent female. See Jolls, *Mandates*, *supra* note 12 (identifying such jobs); *infra* note 197 (explaining why this Article focuses not on female-dominated workplaces but on workplaces that range from male-dominated to some-

more realistic, if it allows for varied intensity of preferences, a widely recognized element of labor supply models. For example, some workers value high wages above all else, whereas others place more value on reasonable hours.

Some women will have an unusually strong preference for a diverse workplace—e.g., those who have already experienced discrimination, or those who are most risk averse (such as women who are their families' primary wage earners). On the other end of the spectrum, some women will have little or no preference for diversity—e.g., those who have never experienced discrimination, those who are least risk-averse, or those who, because they have no personal or professional ties to the community, least fear having to switch jobs.

b. Widening of Small Initial Gender Gap Because of Sorting by Intensity of Preference for Diversity

At the point of initial diversification, when firms first start hiring women, female workers will tend to sort themselves by the strength of their preference for diversity. Women with little or no preference for diversity may choose jobs without regard for diversity, while those with stronger preferences for diversity will focus on the firms with somewhat higher female representation.

At first, the gender gap is modest. Only those women with the strongest preference for diversity—"Type I women"—will make job decisions based on a very small initial gender gap, such as a 2% gap, where one field has 10% women and another has 12%. Whereas the Type I women will disproportionately choose the 12% female workplace, most other women will not notice or care about such a small difference and will make job choices based on other criteria.

Because the Type I women disproportionately enter the slightly more diverse workplace, the gender gap widens a bit—perhaps from a 2% to a 5% gap between workplaces. Because this gender gap is wider, it becomes noticeable and a subject of concern to somewhat more women—specifically, women who are quite concerned about the diversity of their workplace, though not so much as the Type I women. Call these the "Type II women." Most women still may not care about this relatively small gender gap; now, however, the gap is big enough to influence not only the Type I women but also the Type II women. Accordingly, the Type I and Type II women in the job market will disproportionately choose the more diverse workplace.

The process continues: with the Type I and Type II women choosing the field with 5% more women, the gap grows—perhaps to 10%, perhaps larger. This larger gap will start to influence additional women who pre-

fer more diverse workplaces, though not as strongly as the Type I and Type II women. This next group—"Type III women"—will start disproportionately choosing the more diverse workplace, making it still more diverse.

Thus, an initially modest gender gap widens due to positive feedback resulting from a sorting process. Those with the strongest preference for diversity flock to slightly more diverse firms. Because this widens the gender gap, more women are drawn to the more diverse workplaces, making them increasingly diverse in comparison to other firms. Formally, there is positive feedback because an increase in X (the gender gap) leads to an increase in Y (female interest in the more diverse workplace), and the reverse is true as well: an increase in Y leads to an increase in X . Thus, an initial increase in X (which was initially modest) leads to snowballing increases in both X and Y —rapidly increasing diversity in the initially slightly more diverse workplaces and growing gender gaps.

*c. Widening Gender Gaps as a Form of "Female Flight":
The Reverse of "White Flight" Residential Segregation*

This model of widening gender gaps—an initial gap widening due to sorting by intensity of preference for diversity—is a logical reversal of Professor Thomas Schelling's "tipping" model of the "white flight" that yields residential racial segregation. As Adams has summarized:

Schelling's tipping model presumes that white residents have varying levels of racial tolerance. Thus, when the first black person enters a neighborhood, only the most intolerant whites depart. Then, those vacancies are filled by more blacks, causing those whites that are only marginally tolerant to leave. This phenomenon repeats creating a tipping effect that drives more and more whites out¹⁸⁷

The key point of the Schelling's "tipping" model, as Christina Ho has explained, is that

start[ing] with the proposition that a population . . . will exhibit a wide range of preferences about racial makeup[,] . . . Schelling offers an account of how any binary population can manage repeatedly to generate the same highly segregated residential patterns [E]ven a small perturbation in composition, such

¹⁸⁷ Adams, *supra* note 58, at 1119 n.177 (citing Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1985–88 (2000)).

as one caused by a desegregation order, can operate in Schelling's model to produce "tipping"¹⁸⁸

Schelling's analysis is generalizable to gender segregation in the workplace.¹⁸⁹ Both in Schelling's "white flight" model and in this "female flight" model, the theory can be generalized to four elements. Where a market features (1) an initially modest demographic "gap" (whatever the cause) and (2) varied preferences for diversity, then (3) a dynamic positive feedback process of sorting by intensity of preference will occur, resulting in (4) a widening demographic gap.

2. Labor Demand: Employers' Incentives To Hire Women Increase as the Representation of Women Increases

As discussed above, a gender gap can widen in a dynamic process of positive feedback on the supply side of the labor market. On the demand side, a gender gap can increase for different reasons, but with the same result: an initially small gender gap enlarges due to market pressures that yield positive feedback.

a. Decreasing Sexism as a Workforce Includes More Women

An underrepresentation of women facilitates discrimination, hostile work environments, and a general lack of equal opportunity by making inaccurate stereotypes of (and bigotry against) women more likely and hostile environments easier to effectuate, while allowing men to enjoy network benefits based on the dominance of male decisionmakers.¹⁹⁰ Whether arising from inaccurate negative stereotypes, pure bigotry, or a desire to accommodate the biases of customers or employees, an aversion to hiring women is, in labor-economic terms, a decreased employer demand for female labor.¹⁹¹ As a workplace becomes more diverse, these aversions decrease, which means employers' demand for female labor increases.

¹⁸⁸ Christina Ho, *Backfiring in Race Relations and Markets*, 13 STAN. L. & POL'Y REV. 323, 334–35 (2002).

¹⁸⁹ The model is "so abstract that any twofold distinction could constitute an interpretation—whites and blacks, boys and girls, officers and enlisted men, students and faculty." THOMAS SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 138 (1978). Interestingly, although a great many law review articles have applied and discussed Schelling's ideas, none appears to have applied them to discrimination or segregation in the workplace.

¹⁹⁰ See *supra* Part II.B.2.b. The network benefits are partly a labor *supply* phenomenon rather than a labor *demand* phenomenon, but they cut in the same direction.

¹⁹¹ See EHRENBERG & SMITH, *supra* note 1, at 395–98; Jolls, *Antidiscrimination*, *supra* note 29, at 685–86.

b. Search Costs: Advantages in Outreach for Workplaces with More Women

Labor demand is partly based on recruiting expense. An employer's labor costs are lower, and labor demand therefore higher, when recruiting is easier, cheaper, and more successful. Workplaces with more women may find it easier to engage in the sort of efforts that firms often undertake to recruit female candidates, such as having female employees make campus visits, conduct interviews, and perform other recruiting work.

Men can recruit women, of course, but having female employees participating in recruiting may make it more successful. Typical word-of-mouth recruiting benefits those groups already represented in the workplace, usually men, and signals a lack of openness to employees in underrepresented groups, such as women and minorities.¹⁹² Yet the reverse also is possible: recruiting by women can signal to applicants that the firm values female employees, especially when female employees participate in recruiting events expressly designed for women or minorities. Female employees may be more likely to know, through personal connections, other female applicants or places to find female applicants. Just as word-of-mouth recruiting perpetuates the status quo where the decisionmakers are white men, women's involvement in recruiting can change that status quo. Moreover, female employees may have an advantage in communicating with female applicants. They can speak with more credibility about how women are treated at the firm, and they might be better able to phrase advertisements, postings, and recruiting speeches in ways that are more appealing to women, which can have a substantial impact on whether women apply for jobs.¹⁹³

A firm need not have a very high percentage of women to reap these benefits, but a firm with a nontrivial representation of women will find it easier to recruit women successfully than a firm with fewer women. Consequently, firms with more women will have a higher demand for female labor because they will find it easier to find and procure female workers.

c. Startup Costs of Integration

There are certain costs of integration, including: (1) inducing or forcing incumbent male employees to allow women equal opportunity, (2) adapting firm policies to address issues that have not arisen before (e.g., the medical leave policy's coverage of pregnancy/maternity leave), and (3) creating new policies necessitated by workforce diversity (e.g., harassment reporting and antidiscrimination training). Many of these

¹⁹² See *supra* note 162 and accompanying text.

¹⁹³ See *supra* note 179 and accompanying text.

costs are fixed costs,¹⁹⁴ varying little, if at all, with the number of employees or size of the employer. Once a firm begins to diversify, it is likely to adopt an antiharassment policy and set up antidiscrimination training. After it does, that cost does not increase as it further diversifies.¹⁹⁵ Once a firm incurs these costs, however, it can employ the newly included workers more cheaply than its competitors who have not yet borne the same costs. A firm that has already hired many women and developed antiharassment, antidiscrimination, and pregnancy leave policies can hire more women without again bearing the expense of transforming its workplace.

In contrast, a firm that has not yet diversified still faces these initial fixed costs of integration. "Many companies are unwilling to incur the short-term costs of developing effective human resource practices and addressing cultural conflict Moreover, smaller companies often lack the resources to invest adequately in improving their human resource practices."¹⁹⁶ These are fixed costs that, before a firm pays them, are a disincentive to hiring and creating a work environment palatable to the workers in question. Thus, the cost of hiring women is lower, and labor demand for women is higher, for firms that have already adapted their workplaces as necessary.

V. THE QUANTITATIVE MODELS: WHEN WOMEN PREFER DIVERSITY AND DIVERSIFICATION IS UNEVEN, GENDER GAPS REMAIN DESPITE OVERALL DIVERSIFICATION

This Part sets forth more detailed quantitative models of how women's rational preferences for diverse workplaces can lead to durable gender segregation.

A. *The Three Quantitative Models*

This subpart sets out three quantitative models, each simulating the labor market under different assumptions. Each model is based on a labor market characterized by initial exclusion of women, slightly uneven initial integration, and a female preference for gender-diverse workplaces. The first model assumes that all women prefer diversity. The second model assumes that only some fraction of women have that preference. The third model expands on the second model by incorporating the ef-

¹⁹⁴ See PINDYCK & RUBINFELD, *supra* note 69, § 7.1, at 206 (defining fixed costs).

¹⁹⁵ The disability context, which regularly features employers bearing one-time costs, is the classic example in which costs do not impact the future employment level of the accommodated group. See Jolls, *Mandates*, *supra* note 12, at 276 (noting that "[s]uch accommodations entail a one-time cost, and thus an employer would not have any disincentive, as a result of the accommodation mandate, to hire disabled workers once the one-time cost had been incurred").

¹⁹⁶ Sturm, *supra* note 108, at 543.

fects of discrimination, especially in the more male-dominated workplaces.

In short, the models in this Part predict that labor market segregation will arise, and persist, as a result of three simple conditions: (1) an initial state of near-complete exclusion of women from most occupations (whether due to social pressures, government regulation, or both), (2) early gender integration that is uneven among different occupations and different firms, some becoming slightly diverse before others (whether due to random fluctuation or meaningful differences among occupations, firms, or regions), and (3) forces of labor supply and demand making diversification cheaper, easier, and more rewarding in the initially more diverse workplaces, as well as relatively costlier, harder, and less rewarding in the initially less diverse workplaces. Given these conditions, a small gender gap in the early days of integration will widen over time—even as more women enter the labor market, and even without actual discrimination, because women will disproportionately choose more gender-diverse workplaces. Ultimately, the labor market will display a striking contrast of progress and stagnation—increasing female labor force participation and increasing occupational segregation. Discrimination, of course, will widen the gender gap further.

Also strikingly, although the gender gap widens because of women's preferences for more gender-balanced workplaces, it results in a degree of segregation that is suboptimal from women's own perspective. Even as women come to be almost half of the overall labor force, many workplaces will not be at all gender-balanced: some workplaces will become majority-female, while others will remain male-dominated. Ironically, women's rational preference for diversity yields *less* gender-balanced workplaces than we might expect in a labor force that is fairly gender-balanced in the aggregate. This lack of gender balance among workplaces, moreover, leaves the overall labor force slightly less than evenly gender-balanced. Even if equal numbers of men and women want to work, the persistence of segregation discourages some women from the labor force.

1. The First Model: All Women Prefer Gender-Diverse Workplaces

This basic model examines a labor market in which all women have the same preference for a diverse workplace, unlike the qualitative model in the previous Part (in which women had a spectrum of preferences) and unlike the models discussed later in this Part (which create more realism by relaxing the assumption of identical preferences). I make eight assumptions, the first two of which set out the basic theory.

Assumption #1: Women prefer diversity. All else being equal, women prefer workplaces with more women, at least to the extent that workforces

well below 50% women are less appealing than workforces that are closer to 50%.¹⁹⁷

Assumption #2: Initially slight and uneven integration. One firm or sector hires a few women first—here, 10% for mathematical ease.¹⁹⁸

The third, fourth, and fifth assumptions rule out other causes of gender disparities, such as discrimination and women being discouraged from the labor force. These other causes surely exist in the real world, but this model examines how much of the gender gap can be explained *solely* by the theory at hand—that an initially small gender gap and women's preference for diversity will widen the gender gap even absent actual discrimination.

Assumption #3: Men have no diversity preference. Men have no preference as to the presence of women in the workplace—i.e., male applicants do not seek workplaces that are predominately male or ones that are gender-balanced.

Assumption #4: Nondiscriminatory hiring and attrition. Each firm/sector hires in proportion to the population and suffers attrition in proportion to its workforce—i.e., no discrimination causes any part of the gender gap, and less diverse firms do not find it harder to retain female employees.

Assumption #5: 50-50 split of job-seekers. Women and men apply for jobs in equal numbers—i.e., at the point when they apply for jobs, women are not discouraged from entering the labor force as a whole.

Importantly, we would see *more* of a gender gap, not *less*, to the extent that the third, fourth, and fifth assumptions are incorrect. Thus, making these assumptions puts the theory of women's diversity preferences to the

¹⁹⁷ These models do not address women's preferences between female-dominated workplaces and gender-balanced workplaces (i.e., whether a 90% or 50% female workplace is more appealing). The phenomenon of female-dominated workplaces is simply too different from that of male-dominated workplaces for this Article's models to consider. First, male-dominated workplaces are far more likely to reflect women's rational fear of entry due to expectations of discrimination than female-dominated workplaces are to reflect men's fear of entry due to expectations of discrimination. While men are likely to fear the stigma that would accompany their entry into female fields, this presumably would operate differently than fear of entry due to discrimination, perhaps because the stigma a man faces could be mainly a phenomenon outside the workplace (e.g., among friends and family). Second, traditionally male fields emerged because of the deliberate exclusion of women, whereas traditionally female fields emerged because they were the only fields that would accept women. Finally, male occupations have gradually diversified over time as discrimination has decreased, Title VII has taken hold, and societal ideas of appropriate gender roles have changed, whereas these same mechanisms do not equivalently operate to diversify female occupations. Accordingly, the workplaces addressed in these models vary from all-male to roughly one-third male, and the only preference discussed is women's preference between workplaces that are *more gender-balanced* (i.e., closer to 50% women) and *less gender-balanced* (i.e., both further from and well below 50% women).

¹⁹⁸ The 10% figure is not necessary to the findings; any nonzero percent yields a qualitatively similar result. This difference in initial diversification between firms/sectors may be due to a number of different factors, as discussed *supra* Part IV.A.

test: can it explain gender gaps if the other likely causes of such gaps are excluded?

The sixth, seventh, and eighth assumptions are basically model specifications that should not meaningfully affect the ultimate conclusions of the analysis.

Assumption #6: Two relevant firms/sectors, denoted "Alpha" and "Beta," each with (for ease of math) 100 workers. Critically, the analysis is identical regardless of its scale. Alpha and Beta may be two different sectors of the economy, such as heavy industry and retail sales; two occupations, such as teaching and law; two individual companies, such as two particular law firms; or two departments in the same employer, such as a firm's sales division and its human resources division.

Assumption #7: Workers apply for only one job. Applicants choose which of the two employers—Alpha or Beta—to which to apply. This is not as unrealistic as it first sounds. In a broader model, with many employers, this assumption would be merely that applicants cannot apply to *all* employers/sectors simultaneously but instead must focus their efforts on one sector, one job type, or a limited number of employers.

Assumption #8: 100 employees, 10% attrition each year. At both Alpha and Beta, hiring recurs each year to replace the ten departing employees.

a. The Initial State of the Labor Market and Breakdown of Job Applicants

With few women in the labor market, Alpha has a workforce of 10% women (assumption #2), while Beta has no women. This is the relevant initial state.

TABLE 1.1: INITIAL STATE OF LABOR MARKET (FIRST MODEL)

Workplace or sector	% women in workforce	% men in workforce
Alpha	10% (10 of 100)	90% (90 of 100)
Beta	0% (0 of 100)	100% (100 of 100)

Each year, X men and X women apply for jobs in the labor market in which the only workplaces are Alpha and Beta, since under assumption #5 men and women enter and participate in the labor force in equal numbers. Because the men are indifferent to the level of gender diversity in their workforce (assumption #3), they apply in equal numbers to Alpha and Beta, each of which receives $X/2$ male applicants. Women, however, prefer the more gender-diverse employer (assumption #1)—here, Alpha.

Thus, women apply only to Alpha, which receives X female applicants; Beta, because it is the less diverse employer, receives no female applicants. The result of these conditions is that while Beta hires from a pool of only male applicants, Alpha hires from a mixed, but disproportionately female, pool of applicants.

TABLE 1.2: ANNUAL JOB APPLICATIONS TO ALPHA AND BETA
(FIRST MODEL)

Job applications each year	# applying to Alpha	# applying to Beta
Of the X men	$X/2$	$X/2$
Of the X women	X	0
Total (men & women)	X women, $X/2$ men	0 women, $X/2$ men
Per 10 slots	6.7 women, 3.3 men	0 women, 10 men

Because both Alpha and Beta engage in nondiscriminatory hiring (assumption #4), each hires in proportion to its applicant pool. The last row, above, illustrates this: Alpha’s applicant pool is two-thirds women, so for every 10 slots, it can be expected to hire 6.7 women and 3.3 men.¹⁹⁹ Beta’s applicant pool is all male, so it hires 0 women and 10 men.

b. The Evolution of Diversity at Alpha and Beta

Each year, 10 employees leave Alpha and 10 leave Beta (assumption #8). Because the model assumes nondiscriminatory attrition (assumption #4), employees depart in proportion to their population in each workforce. So in the first year, when Alpha is 10% female, 10% of the departing employees are women—i.e., of the 10 departing, 1 is female and 9 are male. At Beta, where all employees are male, all 10 departures are men. The new employees change the female population at Alpha. Of Alpha’s 10 new employees, 6.7 are women, so in the first year, Alpha loses 1 woman (from attrition) but gains 6.7 (from hiring). Beta loses no women and gains no women. At the end of the first year, then, Alpha has a net gain of 5.7 women while Beta has no net gain.

¹⁹⁹ When the model speaks of hiring 6.7 women, it means that is the “expected” number of women hired. That is, a 70% chance of hiring 7 women, with a 30% chance of hiring 6, yields an expected value of 6.7 hired.

TABLE 1.3: FEMALE POPULATION RESULTING FROM ATTRITION AND REPLACEMENT—YEARS 1–2 (FIRST MODEL)

Year	Alpha	Beta
Initially	10.0	0.0
1st year change	+5.7 [−1, +6.7]	0.0 [−0.0, +0.0]
End of 1st year	15.7	0.0
2nd year change	+5.1 [−1.6, +6.7]	0.0 [−0.0, +0.0]
End of 2nd year	20.8	0

The second year, Alpha's population change is slightly smaller. The new arrivals still include 6.7 women, but because Alpha is now more diverse, it loses 1.6 women to attrition rather than 1.0. At the end of the year, Alpha's net gain is 5.1 women; Beta still has no women.

This pattern recurs each year: Alpha's female population still increases, but at a decreasing rate, because as the female population increases, Alpha loses more women to attrition. While it takes only 3 years for women to become one-quarter of the workforce, it takes 11 years for women to become one-half of the workforce.

TABLE 1.4: FEMALE POPULATION RESULTING FROM ATTRITION AND REPLACEMENT OVER TIME (FIRST MODEL)

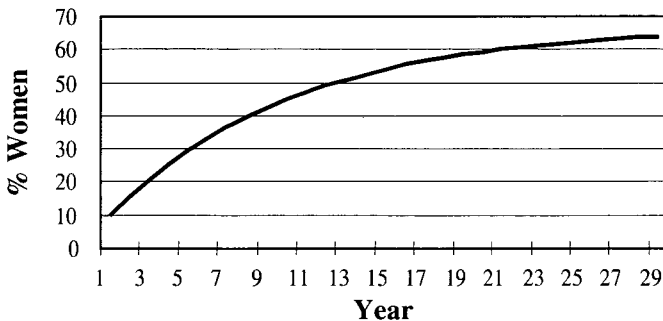
Year	Alpha	Beta
Initially	10.0	0.0
1st year change	+5.7 [−1, +6.7]	0.0 [−0.0, +0.0]
End of 1st year	15.7	0.0
2nd year change	+5.1 [−1.6, +6.7]	0.0 [−0.0, +0.0]
End of 2nd year	20.8	0.0
3rd year change	+4.6 [−2.1, +6.7]	0.0 [−0.0, +0.0]
End of 3rd year	25.4	0.0 [−0.0, +0.0]
4th year change	+4.2 [−2.5, +6.7]	0.0 [−0.0, +0.0]
End of 4th year	29.6	0.0 [−0.0, +0.0]
5th year change	+3.7 [−3.0, +6.7]	0.0 [−0.0, +0.0]
End of 5th year	33.3	0.0 [−0.0, +0.0]
6th year change	+3.4 [−3.3, +6.7]	0.0 [−0.0, +0.0]
End of 6th year	36.7	0.0 [−0.0, +0.0]
7th year change	+3.0 [−3.7, +6.7]	0.0 [−0.0, +0.0]
End of 7th year	39.7	0.0 [−0.0, +0.0]
8th year change	+2.7 [−4.0, +6.7]	0.0 [−0.0, +0.0]

End of 8th year	42.5	0.0 [−0.0, +0.0]
9th year change	+2.4 [−4.3, +6.7]	0.0 [−0.0, +0.0]
End of 9th year	44.9	0.0 [−0.0, +0.0]
10th year change	+2.2 [−4.5, +6.7]	0.0 [−0.0, +0.0]
End of 10th year	47.1	0.0 [−0.0, +0.0]
...
Equilibrium	67.0	0.0

Gradually, Alpha's workforce reaches an equilibrium gender mix (67% women) identical to its applicant pool. It takes many years of increasingly slow diversification for a diverse applicant pool to turn a male-dominated workforce into a gender-balanced workforce. The graph below illustrates how the diversification of Alpha is initially rapid but tapers off over time and reaches a limit (equilibrium).

FIGURE 1

ALL WOMEN PREFER DIVERSITY (FIRST MODEL):
EVOLUTION OF DIVERSITY AT ALPHA



Beta, with no female applicants, does not diversify at all. Representing a firm initially lacking diversity, Beta remains male-dominated even as the labor market diversifies.

2. *The Second Model: Only Some Women Prefer Diverse Workplaces*

The second model modifies assumption #1 of the first model to recognize that women’s diversity preferences are heterogeneous: only some women consider diversity in their job choices.²⁰⁰ Assumptions #2 through #8 remain unchanged.²⁰¹

Revised Assumption #1: Some women prefer diversity, others are indifferent. Half of women prefer workplaces with more women, meaning firms with up to 50% women.²⁰²

a. *The Initial State of the Labor Market and Breakdown of Job Applicants*

The initial state of the labor market is the same as in the first model. At first there are no women (or almost none); then Alpha comes to have a workforce of 10% women (assumption #2), and Beta, not undergoing this change, remains at 0 women.

TABLE 2.1: INITIAL STATE OF LABOR MARKET (SECOND MODEL)

Workplace or sector	% women in workforce	% men in workforce
Alpha	10% (10 of 100)	90% (90 of 100)
Beta	0% (0 of 100)	100% (100 of 100)

Again, each year, X men and X women apply for jobs (under assumption #5). Because the men are indifferent to the level of gender diversity in their workforce (assumption #3), they apply in equal numbers to Alpha and Beta—each receives $X/2$ male applicants.

This model differs from the first model as to where women apply to work. Half of the women ($X/2$) prefer the more gender-diverse employer (assumption #1), Alpha, so these women apply only to Alpha. Half of the women are, like the men, unconcerned with diversity, so they apply in equal numbers to Alpha ($X/4$) and Beta ($X/4$). As a result, Alpha gets many more female applicants ($X/2 + X/4$), but Beta gets some female applicants ($X/4$) as well.

²⁰⁰ See *supra* Part IV.B.1.a.

²⁰¹ See *supra* Part V.A.1.

²⁰² This model assumes women are indifferent as to whether there are more than 50% women. See *supra* note 197.

TABLE 2.2: ANNUAL JOB APPLICATIONS TO ALPHA AND BETA
(SECOND MODEL)

Job applications each year	# applying to Alpha	# applying to Beta
Of the X men	$X/2$	$X/2$
Of the $X/2$ women concerned with diversity	$X/2$	0
Of the $X/2$ women unconcerned with diversity	$X/4$	$X/4$
Total (men & women)	$3X/4$ women, $X/2$ men	$X/4$ women, $X/2$ men
Per 10 slots	6 women, 4 men	3.3 women, 6.7 men

As in the first model, Alpha and Beta engage in nondiscriminatory hiring (assumption #4), so each hires in proportion to its applicant pool (the last row above in Table 2.2). Alpha's applicant pool is $3/5$ women, so per 10 slots, it can be expected to hire 6 women and 4 men. Beta's applicant pool is one-third women, so its expected hiring is 3.3 women and 6.7 men.

b. The Evolution of Diversity at Alpha and Beta

As in the first model, Alpha and Beta each lose 10 employees each year (assumption #8). Under the assumption of nondiscriminatory attrition (assumption #4), employees depart proportionally. In the first year, when Alpha is 10% female, 1 of the 10 departing employees are female. At Beta, where all employees are male, all 10 departures are men.

This model differs from the first model in that Alpha has somewhat fewer female applicants, and Beta has some female applicants. New hiring changes the female population at both workplaces, not just at Alpha (as in the first model). Of Alpha's 10 new hires, 6 are women, so in the first year, Alpha loses 1 woman from attrition but gains 6 from hiring. Beta loses no women and gains 3.3. In the first year, Alpha's net gain is 5 women, and Beta's net gain is 3.3.

TABLE 2.3: FEMALE POPULATION RESULTING FROM ATTRITION AND REPLACEMENT—YEAR 1 (SECOND MODEL)

Year	Alpha	Beta
Initially	10.0	0.0
1st year change	+5.0 [−1.0, +6]	+3.3 [−0.0, +3.3]
End of 1st year	15.0	3.3

The evolution of diversity at Alpha is similar to that in the first model, except that Alpha here has a less female-dominated applicant pool, so its diversification rate is slower, and in equilibrium it has fewer women. The evolution of diversity at Beta proceeds as at Alpha, but with many fewer female applicants, so Beta has less diversification, and its equilibrium remains male-dominated.

TABLE 2.4: FEMALE POPULATION RESULTING FROM ATTRITION AND REPLACEMENT—OVER TIME (SECOND MODEL)

Year	Alpha	Beta
Initially	10.0	0.0
1st year change	+5.7 [−1, +6]	+3.3 [−0, +3.3]
End of 1st year	15.0	3.3
2nd year change	+4.5 [−1.5, +6]	+3.0 [−0.3, +3.3]
End of 2nd year	19.5	6.3
3rd year change	+4.0 [−2.0, +6]	+2.7 [−0.6, +3.3]
End of 3rd year	23.5	8.9
4th year change	+3.6 [−2.4, +6]	+2.4 [−0.9, +3.3]
End of 4th year	27.1	11.3
5th year change	+3.3 [−2.7, +6]	+2.2 [−1.1, +3.3]

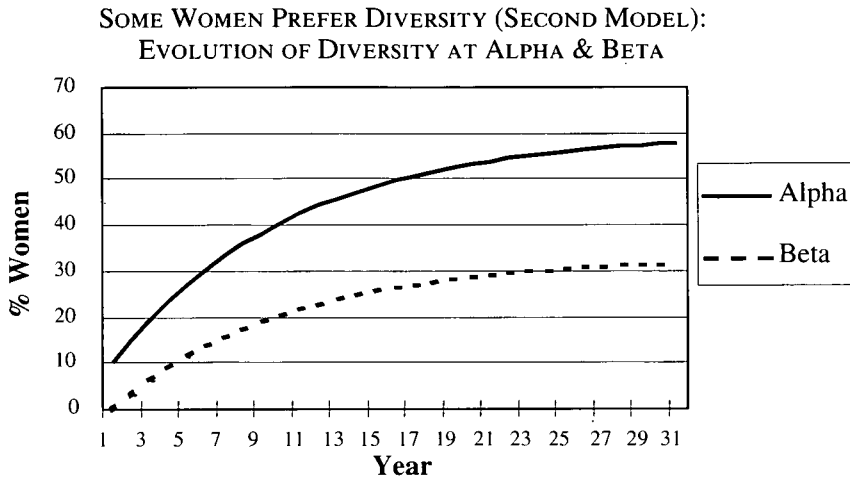
End of 5th year	30.4	13.5
6th year change	+2.9 [-3.1, +6]	1.9 [-1.4, +3.3]
End of 6th year	33.3	15.4
7th year change	+2.7 [-3.3, +6]	+1.7 [-1.6, +3.3]
End of 7th year	36.0	17.1
8th year change	+2.4 [-3.6, +6]	+1.6 [-1.7, +3.3]
End of 8th year	38.4	18.7
9th year change	+2.1 [-3.9, +6]	+1.4 [-1.9, +3.3]
End of 9th year	40.5	20.1
10th year change	+1.9 [-4.1, +6]	+1.3 [-2.0, +3.3]
End of 10th year	42.4	21.4
...
Equilibrium	60.0	33.3

Alpha's and Beta's workforces gradually reach equilibrium levels of 60.0% and 33.3% women, respectively—the percentages in their applicant pools.²⁰³ As in the first model, it takes many years of slow, decelerating diversification for a diverse applicant pool to change a nondiverse workforce. Diversification in this model is greater but still incomplete. The graph below shows how both Alpha and Beta initially see rapid diversification that then tapers off and gradually reaches a limit (equilibrium) that is much higher for Alpha than Beta.

²⁰³ The results are similar, just different in magnitude, if more or fewer than half of women prefer diversity: if p represents the fraction of women who do have a preference for diversity, X is (identically) the number of men in the applicant pool and the number of women in the applicant pool, and EA is the equilibrium fraction of Alpha's workforce that is female, then:

$$EA = (pX + (1-p)X/2) / (pX + (1-p)X/2 + X/2) = (p + 1) / (p + 2)$$

FIGURE 2



3. The Third Model: Effects of Employers' Discrimination and Difficulty Integrating Workplaces

To examine the isolated effects of an initial gender gap and a preference by women for diverse workplaces, the two preceding models assumed no discrimination. The most rapid diversification occurred early on, before attrition started to remove incumbent female employees. This last aspect of the models does not comport with the reality that male-dominated firms and sectors find it difficult to make the initial leap to include a non-trivial number of women.

The third model modifies the second model by considering the effects on diversification of discrimination, as well as search and startup costs faced by employers first hiring women. To the extent that discrimination does exist (i.e., that assumption #4, "nondiscriminatory hiring and attrition," does not hold), there would be a greater gender gap than the first and second models predict. Discrimination and search and startup costs decrease women's rate of hiring and increase women's rate of attrition (relative to the rates for men), thus inhibiting progress toward diversification. Consequently, compared to the above models finding slow and incomplete diversification, initial diversification in the third model is even slower, and the gender gap is even wider.

a. Difficulties of Initially Including Women: Search and Startup Costs

In the first and second models, diversification is fastest early, before attrition slows it down. In reality, as the third model notes, search and startup costs slow the initial pace of diversification.²⁰⁴ They are significant mainly when a firm is *first* incorporating women, and they most inhibit the *initial* efforts at diversification—especially at Beta, which starts out with no women at all. Search and startup costs therefore delay, for the early years of diversification, the success of efforts to increase the workplace representation of women. These costs eventually diminish, as less diverse firms and sectors eventually increase their female populations, but it takes longer than in the second model to achieve even a modest female population.

b. Discrimination in Hiring and Attrition

Diversification is slower than predicted by the second model when discrimination against women exists. Discrimination may occur in hiring decisions, deterred applications when women feel discouraged from applying, or other workplace actions (such as hostile work environments, unequal promotion opportunities, and worse assignments). The latter forms of discrimination yield greater female attrition as women rationally depart and avoid unwelcoming workplaces. In the second model, the rate of diversification was the net of the rate of hiring of women minus the rate of attrition of woman. If women are hired at a lower rate than men, and/or female attrition is greater than male attrition, then the rate of diversification will be slower than the second model predicts.

c. Modeling the Nonlinear Relationship Between Rate of Diversification and Effects of Discrimination Plus Search and Startup Costs

As discussed earlier, there is good reason to expect that discrimination is greater when the workplace is less diverse and *much* greater when it is truly male-dominated. The diversification-inhibiting effects of discrimination are inversely proportional to the female population in a firm or sector, and the relationship is nonlinear. It can be modeled with two variables: *W* (female percentage of workers) and a coefficient *r* (a fraction between 0 and 1 representing the magnitude of discrimination's inhibition of diversification). The graph is modeled as a hyperbola, a shape that creates a nonlin-

²⁰⁴ See *supra* Part IV.B.2.b–c (defining relevant search and startup costs as difficulties male-dominated firms have in recruiting potential female applicants and adjusting workplace policies and behaviors).

ear relationship between W and its effects. The effect of discrimination is high at first (when W is low); then it rapidly diminishes; then it continues to diminish, but more slowly. The formula for the hyperbola is:

$$f(r, W) = 1 - r / (1 + W/10)$$

Table 3.1 shows the effect if $r = 0.6$ (i.e., if discrimination inhibits initial diversification by 60% and incrementally less as the female population increases).

TABLE 3.1: EFFECTS OF DISCRIMINATION AND SEARCH/STARTUP COSTS:
AMOUNT OF INHIBITION OF DIVERSIFICATION

If $r = 0.6$ (i.e., discrimination inhibits initial rate of diversification by 60%) ²⁰⁵	
W	<i>Inhibiting effect of discrimination: $1 - r / (1 + W/10)$</i>
0	0.40 (i.e., the diversification rate is only 40% of the rate that would exist without discrimination and search/startup costs)
10	0.70 (only 70%)
20	0.80 (80%)
30	0.85 (85%)
40	0.88 (88%)

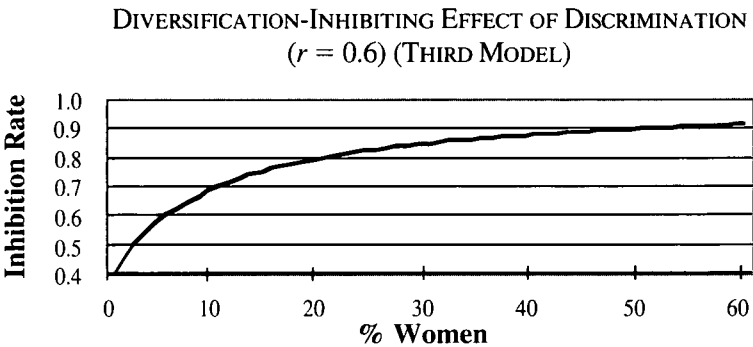
²⁰⁵ For different levels of r , there is a similar "curve" showing how much discrimination inhibits diversification at various levels of female representation (W). The effect varies in magnitude, but the basic relationship between W and the inhibiting effect of discrimination is the same hyperbola based on the function above, $f(r, W) = 1 - r / (1 + W/10)$. For example, if $r = 0.5$, the inhibiting of diversification is similar to when $r = 0.6$, just slightly lesser in magnitude:

If $r = 0.5$ (i.e., 50% inhibition of initial rate of diversification)	
W	<i>Inhibiting effect of discrimination: $1 - r / (1 + W/10)$</i>
0	0.50 (i.e., the diversification rate is only 50% of the rate that would exist without discrimination and search/startup costs)
10	0.75 (only 75%)
20	0.83 (83%)
30	0.88 (88%)
40	0.90 (90%)
50	0.92 (92%)
60	0.93 (93%)

50	0.90 (90%)
60	0.91 (91%)

Graphically, the relationship is a hyperbola crossing the vertical axis (i.e., where $W = 0$) at $1 - r$ and increasing rapidly, then slowly, until W increases enough to lessen the effects of discrimination.

FIGURE 3



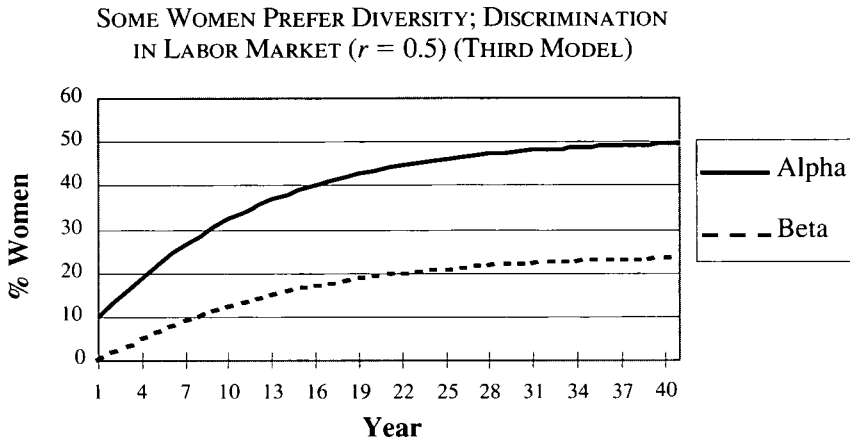
d. Evolution of Diversity at Alpha and Beta: Slower Diversification, Especially at Early Stages of Integration

The third model modifies the second model by considering that discrimination and search and startup costs depress female labor force participation, especially when women are most underrepresented in the workplace. Because diversification is severely inhibited in the early days of integration and somewhat less inhibited later, diversification is much less rapid initially. Eventually, as more women enter the workforce, the effects of discrimination and search and startup costs diminish. In this light, diversification efforts face a circular problem: effective diversification requires the entrance of women, but a lack of women prevents them from entering.

The diversification curve in the third model (Figure 4) is less steep than in the second (Figure 2), especially when diversification is just starting. It eventually steepens, but much later than in the second model. The details depend on the magnitude of the diversity-inhibiting effects of discrimination (coefficient r), but the difference may be dramatic. For example, in the second model, Alpha achieves a 40% female workforce after 9 years. In this third model (with $r = 0.5$), because diversification is slower, especially at first, Alpha reaches 40% only after 15 years.

Discrimination and search and startup costs make diversification not only slower, but also less complete. Alpha's equilibrium in the second model was 60% female. Here, while discrimination diminishes after some diversification occurs, its residual effects leave the labor force with fewer women. When $r = 0.5$ or 0.6 , for example, the equilibrium representation of women at Alpha is about half (50.5% and 48.3%, respectively), and the equilibrium at Beta is less than a quarter (24.0% and 21.7%, respectively). Below is the graph of both workforces where $r = 0.5$.²⁰⁶

FIGURE 4



B. Implications of the Models

The above models have a number of implications for labor markets and female workers. These implications are the same in all models, differing only in the magnitude of resulting segregation. The models demonstrate that given an initially small gender gap, plus a preference among some women for a diverse workplace, we can expect to see the labor market evolve as follows, even absent discrimination in the particular workplaces being studied. The first three implications focus on what these models mean for employers (i.e., for the labor market as a whole or for individual firms/sectors), and the last two focus on what these models mean for women.

Implication #1: Majority-female workforce at the initially slightly diverse firms/sectors; continued male domination of other firms/sectors. Once Alpha started out as slightly more diverse than Beta (the initial 10%

²⁰⁶ Again, with a different r , the ultimate outcome would be similar, just slightly different in the ultimate pace and extent of integration. If $r = 0.6$, for example (i.e., if discrimination inhibits the initial rates of diversification by 60%), diversification would be even slower and even less complete than in this graph showing the pace and extent of integration when $r = 0.5$.

gender gap), women overwhelmed Alpha's applicant pool, making most of that pool female and leaving most or all of Beta's applicant pool male. Thus, even absent discriminatory hiring practices, Alpha will continue to hire more women than men, and Beta will continue to hire primarily or only men.

Implication #2: Decelerating diversification of the more diverse firms/sectors. The more diverse a workplace gets, the more its attrition includes women.²⁰⁷ Consequently, the net rate of increase of the percentage of women there declines over time, and "even if nondiscrimination in personnel actions were to be scrupulously followed, [nondiscrimination] still would not be an expeditious way to overcome the adverse effects of past discrimination."²⁰⁸ Thus, even if the rate of diversification looks impressively rapid at first, it eventually slows considerably. This is a somewhat counterintuitive outcome given the widespread belief that the toughest part of diversification is the initial work of beginning to include the excluded group.

Implication #3: Deeper applicant pools in the more diverse firms/sectors. While Alpha's applicant pool includes both women and men, Beta's includes primarily men. This is the "discrimination penalty" Beta faces. In a broader model, Beta might, for example, have to pay a compensating wage differential to induce women to apply for jobs. However, as discussed below, such efforts have questionable efficacy and might be legally suspect.²⁰⁹

Implication #4: Suboptimally uneven diversity from women's perspective. In the models, women prefer a balanced workforce (or at least identically prefer 50% or 67% women over none). But their choice is only between a female-dominated workplace (Alpha) or a male-dominated workplace (Beta). Women on average would be better off (i.e., closer to their goals of always working in diverse environments) if they applied in equal numbers to both diverse (Alpha) and nondiverse (Beta) workplaces. However, the collectively rational outcome—uniform diversity across the labor market—does not occur, because it is rational for each *individual* woman to apply to the more diverse workplace (Alpha). Schelling has noted, in an analogous discussion of college students' social decisions, how individuals who prefer diversity may subvert that preference by avoiding the less diverse option, paradoxically leaving the level of diversity suboptimally uneven precisely as a result of their decisions to pursue diversity.²¹⁰

Implication #5: Fewer women in the labor market overall. In the second model, the eventual equilibrium result was 93 women (combining Alpha and Beta) and 107 men (since Alpha and Beta employed a total of

²⁰⁷ See, e.g., EHRENBERG & SMITH, *supra* note 1, at 413–14 & tbl. 12.7 (noting the phenomenon and providing a simple numerical example).

²⁰⁸ *Id.* at 413.

²⁰⁹ See *infra* Part V.D.

²¹⁰ SCHELLING, *supra* note 189, at 37–38.

200 workers). There was a 50-50 split of job-seekers, so what happened to the other 7 women?²¹¹ They most likely became part of the unemployment rate, or they entered the ranks of the "discouraged unemployed" who stop seeking jobs after not finding the kind of work they sought. Not all women can get jobs in the preferable more diverse workplace/sector (Alpha), and jobs in the less diverse workplace/sector (Beta) are less appealing to women than to men. Some women—the ones who value diversity relatively highly and thus apply to Alpha but are not offered a job—would choose to leave the labor force rather than work at Beta.

C. Beginning an Empirical Examination: Comparison to the Actual Labor Market

The predictions of the above models do seem consistent with the recent evolution of the American labor market. In the four decades since Congress passed Title VII and the Equal Pay Act,²¹² the first wide-scale efforts at gender equity and diversification, there has been a peculiarly uneven and incomplete degree of diversification of the labor market.

From the era of industrialization in the nineteenth century²¹³ to the mid-twentieth century, subject to rare exceptions, women and minorities were excluded from all but a few generally undesirable occupations that were held mainly by women and minorities.²¹⁴ In the early to mid-twentieth century, the workforce began to diversify by gender and race, spurred partly by social change and partly by war-induced shortages of (white) male labor.²¹⁵ Whatever the cause, diversification was inconsistent across occupations and even subfields of the same occupation:²¹⁶ even as the overall workforce integrated, integration in historically male subfields was slow.²¹⁷

²¹¹ The shortfall is worse in the third model, which considers discrimination. The size of the drop-off depends on the magnitude of discrimination.

²¹² Equal Pay Act, 29 U.S.C. § 206(d) (1994).

²¹³ I choose this starting point as essentially the beginning of the modern labor market in which work outside the home began to constitute most of the (paid) labor performed. See WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 20–24.

²¹⁴ *Id.*

²¹⁵ See Motley, *supra* note 182, at 539.

²¹⁶ See, e.g., Jones, *supra* note 63, at 4–5 (discussing the lack of women in the legal profession until relatively recently).

Women made their way into the legal profession substantially after they began entering other professions in significant numbers. While women comprised a significant percentage of teachers and social workers, and were beginning to enter the medical and scientific fields in more than token numbers, in 1920 only slightly more than one percent of the country's lawyers were women.

Id. at 4 (citing VIRGINIA G. DRACHMAN, *SISTERS IN LAW* 12 (1998)); see also *supra* Part IV.A (suggesting why some fields and firms experienced initial integration while others remained segregated).

²¹⁷ See, e.g., Sturm, *supra* note 108, at 492–98 (discussing task forces formed at Deloitte & Touche to improve the firm's retention and promotion of female employees). One

The recent American labor market has seen continued increases in female labor force participation but highly durable occupational segregation.²¹⁸

One difference between the actual labor market and the labor market theorized by this Article is that the latter predicts that occupational segregation will *widen* before stabilizing. In reality, occupational segregation *declined* before stabilizing at a still substantial level. The difference may be that Title VII, whatever its flaws, has been a powerful tool for attacking truly overt discriminatory exclusion.

When Title VII was passed, the labor market was replete with what Sturm has termed "first generation discrimination": "Workplace segregation was maintained through overt exclusion, segregation of job opportunity, and conscious stereotyping. Dominant individuals and groups deliberately excluded or subordinated women."²¹⁹ Title VII was well-suited to attack first generation discrimination, as reflected by the decline in occupational segregation during the 1960s and 1970s. Occupational segregation began to level off, however, in the 1980s and stabilized almost completely in the 1990s.²²⁰ This stabilization may reflect that, as Sturm has theorized, society's remaining gender problems are "second generation discrimination"—the more subtle forms of bias and disadvantage that act as headwinds preventing full equality and that Title VII has difficulty targeting effectively.²²¹

Thus, Title VII can explain the initial decline in occupational segregation not predicted by this Article's models. The leveling off of occupa-

task force found that "women's assignments tended to be clustered in not-for-profit companies, health care, and retail Women were rarely assigned to such high-potential areas as mergers and acquisitions." *Id.* at 496 (alteration in original) (quoting Jane Roessner, *Deloitte & Touche (B): Changing the Workplace*, Harvard Business School Case Study No. N9-300-013, at 5 (Sept. 28, 1999)). This phenomenon can also be seen in the legal profession:

Recent empirical evidence suggests there is occupational segregation in the legal profession Women tend to be over-represented in certain areas[,] . . . more likely to work in government and public interest jobs[,] . . . more likely to specialize in fields that are comparatively less lucrative, such as family law[, and] . . . unlikely to work in bankruptcy, securities, and criminal cases involving narcotics and organized crime. [Women] will not succeed in the legal academy to the same extent as [their] male colleagues.

Jones, *supra* note 63, at 15–17; see also Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75, 75 (1997) ("The position with the second highest percentage of women professionals (67%) employed in law schools is in the Lecturer/Instructor category"); Constance Baker Motley, *My Personal Debt to Thurgood Marshall*, 101 YALE L.J. 19, 23 (1991) (noting that the United States Attorney's Office for the Southern District of New York did not decide that women were as capable as men at handling federal criminal prosecutions until 1970, when the first woman was hired in the criminal division).

²¹⁸ See *supra* Part I.

²¹⁹ Sturm, *supra* note 108, at 465–66.

²²⁰ See *supra* notes 10–12 and accompanying text.

²²¹ See Sturm, *supra* note 108, at 468–78.

tional segregation, as Title VII stopped being as powerful a tool against contemporary second generation discrimination, shows that absent an anti-discrimination enforcement regime capable of redressing this type of discrimination, labor markets will remain segregated even as they include more and more women, exactly as predicted by this Article's models. Future empirical work could provide confirming or disconfirming evidence of whether this Article's theory accurately characterizes labor markets at a micro level. Some questions to ask include: Within an industry, has integration been incomplete and uneven among firms? Has the rate of integration been higher at those firms that began to diversify sooner?

D. Possible Responses of the "Beta" Firms with an Underrepresentation of Women: Compensating Wage Differentials

A full analysis of possible responses of the "Beta" firms to correct their underrepresentation of women is beyond the scope of this Article. Such responses are important: technically, one cannot conclude that a market is reaching an inefficient result without examining all possible responses to such inefficiency. One of the premises of this Article, however, is that firms in recent years have become less able to signal to female workers that they treat women fairly. This subpart discusses the efficacy and legality of certain measures that the "Beta" firms can and do take to redress their shortages of female labor.

1. Wage Differentials for All Employees

Beta might respond to a shortage of female applicants by raising wages or benefits to expand its entire applicant pool, male and female. However, Beta still would draw more male than female applicants, since on average, for the same wage, men will find a Beta job more appealing than women will. Many women who prefer diverse workforces, but are drawn to Beta by higher wages, will be less happy with the job than their male coworkers. The lack of appeal to women means not only fewer female applicants, but also higher female attrition.

More generally, an employer that needs job applicants but possesses an undesirable workplace can procure applicants in two ways. It can hire those who least mind the undesirable workplace condition,²²² but this will not cure the shortage of applicants. Alternatively, it can offer a "compensating wage differential"—a higher wage that would make it worthwhile for some workers to suffer the workplace condition. Yet its applicant pool still will be populated by the workers least bothered by the workplace con-

²²² This assumes workers vary in their distaste for undesirable workplace conditions—a realistic assumption because people vary in their degree of general risk aversion and tolerance of specific risks and conditions (e.g., verbal abuse, cigarette smoke, long work hours).

dition, since these workers require the lowest compensation to endure the unpleasant condition. To the extent women find a lack diversity undesirable, more men will apply to Beta whatever the wage offered, leaving Beta with a disproportionately male applicant pool.

2. Wage Differentials for Female Employees Only: Benefits and Affirmative Action as Compensating Wage Differentials

Beta might decide that its problem is not just a shortage of applicants but a lack of female interest in its jobs. Based on this realization, it could offer a compensating wage differential only to female employees. While it is illegal to pay women more than men for the same work, there are more subtle ways Beta can accomplish the goal of spending more money on female employees. Some firms offer paid maternity or parental leave and childcare support²²³—expenditures that female employees (on average) take advantage of more often than male employees do. Such benefits function as a higher wage for female workers.

In this light, certain female-friendly measures are a form of affirmative action, which itself serves as a compensating wage differential. Beta could offer women a higher chance of promotion than men, essentially offering women higher projected future wages. Somewhat analogously, Pompian has argued that affirmative action is a means of counteracting expectations of discrimination.²²⁴ The comparable observation here is that, even if no “discrimination” is known to be present, affirmative action can help women recognize a greater prospect for high future compensation in a job that is otherwise unappealing because it is in a male-dominated workplace. Employers can reach this result using various forms of affirmative action: actual hiring or promotion preferences for women, benefits used mainly or exclusively by women (e.g., childcare or maternity leave), or scholarships for women. Recent judicial restrictions on affirmative action²²⁵ may limit the ability of firms to provide female workers this sort of compensating wage differential. Nevertheless, as discussed later, this Article’s analyses show that such affirmative action remains normatively appealing.²²⁶

²²³ See, e.g., NALP DIRECTORY, *supra* note 8 (citing law firms’ maternity and parental leave policies); *id.* at 1284 (noting that Cadwalader, Wickersham & Taft LLP offers attorneys “back-up child care”); *id.* at 1285 (noting that Cahill Gordon & Reindel LLP provides “emergency child care”).

²²⁴ Pompian, *supra* note 48, at 554–57.

²²⁵ See *supra* notes 112–114 and accompanying text.

²²⁶ See *infra* Part VI.B.3.

VI. IMPLICATIONS FOR EMPLOYMENT DISCRIMINATION LAW: NORMATIVE PRESCRIPTIONS

This Part discusses ways in which we should expand and refocus anti-discrimination law and policy to remedy the problem of persistent occupational gender segregation. The observation of durable gender segregation could support competing normative arguments: the "conservative" argument against imposing burdens and duties on employers whose workplaces remain male-dominated, and the "liberal" argument that employers whose workplaces remain male-dominated should be subject to a broad regime of civil liability and affirmative action duties. In that debate, this Article decidedly advocates the "liberal" side. Because the durability of segregation and the preferences that reinforce segregation are results of society's history of discrimination and exclusion, we should undertake aggressive antisegregation efforts such as changes to the focus and burdens of proof in Title VII cases, affirmative action, and educational reform. Such measures, however, must be carefully targeted to avoid the creation of counterproductive incentives that could worsen rather than improve the situation.

A. Legal and Policy Implications: Fodder for Both Sides?

This Article demonstrates that occupational gender gaps are quite persistent, even absent current discrimination, but especially when discrimination is present. The solution this Article advocates is that employers with workplaces that remain male-dominated should be subject to a broad regime of civil liability and affirmative action duties. Yet this Article's conclusions could also support an argument *against* imposing such burdens and duties on these employers. As discussed below, however, much of that argument is based on a far too restrictive view of both women's choices and society's responsibilities to correct its failures.

1. The Conservative Argument for Employers: "It's Not Our Fault"

In response to this Article's models, an employer with few women might argue (to put it bluntly), "See, it's not our fault." In other words, current business owners and workplace decisionmakers are not responsible for their current gender gaps, which resulted from decades-old, initially small gender gaps. Whether these gaps originated from random chance or discrimination, they have widened due to women's own choices. According to this line of argument, current workplace gaps, even large ones, are not clear evidence of discrimination because (as demonstrated by the first and second models) even firms that do not discriminate may find themselves lacking female applicants and thus forced to hire mainly men. As a matter of employment law doctrine, the conclusion that durable, substan-

tial gender gaps may not reflect intentional discrimination can support two conservative arguments against discrimination liability: (1) statistical evidence is insufficient to prove discrimination, and (2) gender gaps result from women's choices rather than from discrimination.

a. Argument 1: Statistical Evidence of Gender Disparity Does Not Demonstrate Discrimination

This Article's analysis could support an argument against the long-established rule that a statistical showing of a workplace gender disparity can prove discrimination. In class actions, "relevant statistical comparisons alone may establish a prima facie case of discriminatory practices."²²⁷ Such statistics usually must compare the defendant's workforce to the actual applicant pool, but if applicant data is unavailable or unreliable, then plaintiffs can, in appropriate cases, simply compare the defendant's workforce to that of the local labor force.²²⁸ In individual discrimination cases, in contrast, where statistics "may be helpful, though ordinarily not dispositive," evidence of a gender disparity "need not be so finely tuned."²²⁹ The statistics must show only the numbers of men and women in a defendant's work force without any consideration of the applicant pool or the other workers' qualifications.²³⁰

²²⁷ *DeLoach v. Delchamps, Inc.*, 897 F.2d 815, 820 (5th Cir. 1990); see also *Bruno v. W. B. Saunders Co.*, 882 F.2d 760, 767 (3d Cir. 1989) (noting that in class actions, "where liability depends on a challenge to systemic employment practices[,] courts have required finely tuned statistical evidence," including a "requirement that statistical evidence account for minimum qualifications" (alteration in original)).

²²⁸ See, e.g., *United States v. City of Warren*, 138 F.3d 1083, 1093–94 (6th Cir. 1998) (noting that "certain employment practices obscure labor-market statistics, alternative statistical analysis suffices to establish a prima facie disparate impact"). Likewise, "[where] 'labor market statistics will be difficult if not impossible to ascertain[.] . . . measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs are equally probative,' and 'where 'figures for the general population might . . . accurately reflect the pool of qualified job applicants,'" . . . plaintiffs may 'rest their prima facie cases on such statistics'" (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989) (citing *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979))).

²²⁹ *Bruno*, 882 F.2d at 767 (citing *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984)).

²³⁰ See, for example, *Luciano v. Olsten Corp.*, in which the court admitted simple statistics—charts and graphs showing gender breakdown and average salaries for various job titles—in an individual sex discrimination case because "[i]t is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices [T]he data offered was not of a scientific nature but merely reflected existing conditions at the Company at the time of Luciano's termination." 110 F.3d 210, 217 (2d Cir. 1997) (quoting *Hollander v. Am. Cyanamid Co.*, 895 F.2d 84, 89 (2d Cir. 1990)). See also *Warren v. City of Carlsbad*, 58 F.3d 439 (9th Cir. 1995), which reversed a grant of summary judgment to a defendant in an individual national origin discrimination case. *Id.* at 443–44. Plaintiff had presented "statistical evidence suggesting possible bias in the fire department." *Id.* at 444. The statistics lacked data on applicants and were merely "that only two men of color work in the entire Carlsbad fire department, and that they occupy the lowest ranking positions[,] and . . . of the twenty five fire fighters who have served as fire captain . . . , only one was a member of a minority group." *Id.* at 443. See also *Pierce v. Atchison, Topeka & Santa Fe Railway Co.*, 65 F.3d 562 (7th Cir. 1995), an individual age

This Article's analysis, however, shows that gender disparities can persist even absent current discrimination. Thus, an argument can be made that the existing doctrine exaggerates the probative value of statistics showing workplace disparities. Disparities may reflect only discrimination that occurred long ago—before any applicable limitations period²³¹—and a subsequent decision by women not to enter that workplace, despite a lack of any unlawful discrimination in the recent past.

b. Argument 2: Gender Gaps Result Not from Discrimination but from Women's Lack of Interest in Predominantly Male Jobs

This Article's analysis could support a broad application of the "lack of interest" doctrine, as typified by the previously discussed *EEOC v. Sears, Roebuck & Co.*²³² In that case, the court accepted the argument that women's own choices, not gender-biased hiring practices, were the cause of the gender disparity in commission sales positions.²³³ Agreeing with Sears's defense, the court held that women chose not to pursue the position because its nature was not appealing to them. Similarly, in this Article's models, women decline to work in certain occupations because they prefer diverse workplaces and are disinclined to join a predominantly male workplace. Furthermore, employers can do little to solve this problem: if an employer has a mostly male workforce, it will have difficulty signaling to women that it is a fair, nondiscriminatory employer.²³⁴

c. The Rejoinder to Argument 2: A Disincentive Rather than a True or Innate Lack of Interest

The modified "lack of interest" explanation presented in argument 2 is troubling because it badly misreads the cause of women's disinclination to join male-dominated workforces. Literally, of course, the problem of women choosing not to enter male-dominated fields *does* reflect a lack of interest

discrimination case in which the court admitted a document showing that the defendant hired seven younger employees after terminating the plaintiff. The defendant argued that "without statistics regarding the relevant applicant pool or qualifications of those employees, the list was not probative while being very prejudicial." *Id.* at 573. The court found that the document "demonstrates . . . that Santa Fe hired younger people to fill the position . . ." *Id.*

²³¹ The statute of limitations for a Title VII gender discrimination claim is 180 days or, if a state or local antidiscrimination agency exists and meets certain prerequisites, 300 days. 42 U.S.C. § 2000e-5(e)(1) (2004). Some state and local laws have a three-year statute of limitations. *See, e.g.,* N.Y. C.P.L.R. § 214(2) (McKinney 2004) (three-year limitations period for discrimination claims); N.Y.C. Admin. Code § 8-502(d) (2001) (three-year limitations period for discrimination claims).

²³² 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). *See supra* Part III.B.2.b.i.

²³³ *Sears*, 628 F. Supp. at 1302–03.

²³⁴ *See supra* Part III.B.1.c.

in the jobs, but it does *not* represent an innate preference as portrayed by courts crediting employers' "lack of interest" defenses.²³⁵ As Katherine Baker has noted, because "women have been deprived of access[,] . . . their preferences . . . are not likely to reflect what their preferences could be in a world in which they had more power [T]hey are making choices that they would not make in a world with different norms and laws."²³⁶ As Williams has colorfully articulated, "[c]hoice is only a defense against discrimination if women's marginalization is freely chosen in the same sense that some people choose Mars Bars over Baby Ruths."²³⁷

Schultz has collected evidence that workplace gender segregation is not a simple result of innate preferences, childhood socialization, or family considerations. In her study of women's work experiences and choices, Schultz showed that although "people and jobs are gendered[,] . . . they are not naturally or inevitably so."²³⁸ Rebutting the idea that women *inherently* lack interest in traditionally male fields, Schultz has noted that "family-related characteristics" such as marriage or children "do not predict women's likelihood of being employed in a male-dominated or female-dominated occupation at any given time."²³⁹ She also cites evidence that women do not inevitably seek "jobs sex-typed as 'female' . . . [over] jobs sex-typed as 'male'" but instead "change the sex-type of their occupations over time."²⁴⁰ This shows that women "acquire[] definite work preferences and a stable work role identity only after 'a number of on-the-job experiences and trial and error experiments.'"²⁴¹ Schultz does not deny the influence of gendered socialization of children, but she concludes that "early socialization is a *necessary but insufficient* condition to account for sex segregation at work."²⁴²

Williams similarly rejects the argument that women and men have inherently different job preferences. She argues that much of the current gender inequity results from the work/family conflict faced by mothers who, even when they work, remain saddled with disproportionate home-

²³⁵ See *supra* Part III.B.2.b.i.

²³⁶ Katherine K. Baker, *Gender, Genes and Choice: A Comparative Look at Feminism, Evolution, and Economics*, 80 N.C. L. REV. 465, 510, 518 (2002). Feminist legal scholarship has recognized the law's role in creating, perpetuating, and reifying gender norms and even the notion of biological sex. See, e.g., Tracy Higgins, *By Reason of Their Sex: Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1550-54; JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 2* (1990). The law often takes as given what it has in fact had a hand in creating.

²³⁷ WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 15.

²³⁸ Schultz, *Telling Stories*, *supra* note 29, at 1815.

²³⁹ *Id.* at 1819-20. Cf. Selmi, *supra* note 93, at 729 (noting that "disparities in housework persist even in dual-earner couples, as working women still perform approximately twice as much housework as their spouses" and arguing that "it seems clear that marriage and children negatively affect women's wages and career paths").

²⁴⁰ Schultz, *Telling Stories*, *supra* note 29, at 1817-18.

²⁴¹ *Id.* at 1822 (quoting MARY WALSHOK, *BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER* 115-16 (1981)).

²⁴² *Id.* at 1824 (emphasis added).

making and childcare duties.²⁴³ But she notes that women's domestic role is neither innate nor inevitable. What many see as the natural domestic role of women was not deemed "women's work" until the past century.²⁴⁴ In the 1700s and much of the 1800s, women were considered markedly inferior, but they were not pigeonholed into "domesticity" in the modern sense. "[C]hild care was not seen as a task requiring full-time attention," and women assisted their husbands by doing "work traditionally done by men," including serving as "blacksmiths, wrights, printers, tinsmiths, beer makers, tavern keepers, shoemakers, shipwrights, barbers, grocers, butchers, and shopkeepers."²⁴⁵ After the shift to an industrial economy took men out of the home for long work days, society adopted the modern "descriptions of the 'true natures' of men and women," with women supporting their husbands' absences by doing all the domestic work.²⁴⁶

In sum, those who advance the "lack of interest" argument improperly essentialize, or view as innate, the preferences that many women currently express; they ignore the fact that gendered characteristics change as cultural practices change.²⁴⁷ We can recognize women's preferences while simultaneously working to change the conditions that give rise to them and holding accountable the employers that fail to take aggressive efforts to remedy those conditions.

2. *A Better Interpretation: Fighting Prejudice Is Not Enough*

This Article argues for a different, more liberal, interpretation of the models set forth here: we must do more than merely fight bigotry if our goal is genuine equal opportunity in the labor market. If gender gaps that inefficiently and unfairly inhibit women's choices can persist and even widen without intentional discrimination, then we must broaden our focus beyond formally illegal discrimination. Aggressive use of antidiscrimination laws, while important, simply will not redress the gender gaps we continue to see.

Tangibly harmful consequences result from workplace gender gaps. Because women who behave entirely rationally are deterred from entering male-dominated workplaces, those workplaces remain male-dominated and unwelcoming to the few women who do enter. Thus, the overall labor force remains disproportionately male. This causes women to lose out on equal workplace opportunities and denies employers the benefit of a more complete labor pool. Gender gaps also have the inefficient effect of skewing women's choices. Women who are best-suited (by talent, inter-

²⁴³ See generally WILLIAMS, *UNBENDING GENDER*, *supra* note 3.

²⁴⁴ *Id.* at 20–24.

²⁴⁵ *Id.* at 21.

²⁴⁶ *Id.* at 23.

²⁴⁷ See, e.g., MINOW, *supra* note 141, at 34, 42; WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 20–24.

est, etc.) for work that is male-dominated are incentivized, by the gender gap, to choose predominantly female lines of work, which have the added disadvantage of likely being lower-paying.

Although we have made some progress against the problem of the exclusion of women from the workforce, “[i]t is a mistake to think that time alone will result in gender parity.”²⁴⁸ The notion “that we have solved the problem with gender inequity” is dangerous: “In some sense, the American women’s movement is a victim of its own success. Its accomplishments have undercut the urgency of further struggle.”²⁴⁹

Moreover, the premise that the law should only enforce bans against intentional discrimination is based on the flawed “perpetrator perspective” of current antidiscrimination laws, which views discrimination as occurring in rare, discrete instances rather than as a background condition of society.²⁵⁰ By focusing on individual rather than societal discrimination and requiring fault and causation as prerequisites to recovery, this view of discrimination tends to ignore the damaging effects of pervasive, structural discrimination,²⁵¹ for which employers should also be held accountable, at least as a matter of morality or social policy if not as a matter of civil liability, when they fail to take active measures to redress it.

In sum, gender gaps constitute a serious, complex problem that basic antidiscrimination doctrine will not adequately remedy. The need therefore arises for broader tools to combat both workplace disparities and the lack of fully equal opportunities.

B. Normative Suggestions

1. Generally: More Intervention into Labor Markets

A major implication of this Article’s analysis is that more governmental and/or judicial intervention is both justified and necessary to correct a deeply imperfect labor market. Free-market dogma dictates that we should generally defer to market outcomes as presumptively efficient because they are the result of freely made decisions among all market participants.²⁵²

²⁴⁸ Jones, *supra* note 63, at 46.

²⁴⁹ *Id.* at 47 (quoting DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 14 (1997)).

²⁵⁰ See Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL’Y 225, 231–32 (2003) (citing Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1976)).

²⁵¹ See *id.* at 231–33; Charles R. Lawrence III, *Book Review: “Justice” or “Just Us”: Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 845–46 (1983) (“The perpetrator perspective first drastically narrows the legal concept of discrimination and then, despite the continuing presence of the conditions formerly associated with discrimination, proclaims the disease cured, or at least almost cured.”).

²⁵² See, e.g., Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U.

The state of today's labor markets, however, is not the efficient product of freely made employer-employee decisions. Rather, it is the product of several market inefficiencies: (1) an inefficient initial state of gender exclusion, (2) discrimination that maintained some degree of that initial exclusion, and (3) female workers' rational decisions to disfavor male-dominated workplaces because they lack complete and accurate information about which workplaces discriminate.

A full normative analysis of tools to redress gender gaps is beyond this Article's scope. The following is a brief discussion of proposals that are supported by this Article's conclusions.

2. Broader Civil Liability: Coverage of "Unintentional" Discrimination and a Shift in Focus of Discrimination Law

Toughening antidiscrimination laws could not only lessen discrimination but also slow female attrition. Both of these effects would accelerate the diversification rate, over time lessening the gender gap between the labor market's inclusive Alphas and male-dominated Betas.²⁵³

a. Strengthening Liability for "Unintentional" Discrimination

This Article's analysis demonstrates that gender gaps cannot necessarily be eliminated by lessening intentional discrimination. Women tend to choose against male-dominated workplaces both because they suspect that discrimination might be the cause of the disparity and because, regardless of the cause of the disparity, there are many problems endemic to male-dominated workplaces, such as male-dominated culture and subjective decisionmaking that favors men.

Discrimination law can do better to target these endemic problems reflecting the not-quite-intentional ways male-dominated workplaces discourage female entry. The outer frontiers of antidiscrimination law cover a range of practices that do not reflect pure discriminatory animus but nevertheless disadvantage women. These "accommodation mandates" (in Jolls's terminology) include family/medical leave (which covers childbirth and certain childcare responsibilities)²⁵⁴ and disparate impact liability (for various "neutral" workplace conditions and policies with a disproportionately

L. REV. 975, 987 (2002) ("[B]ecause private markets are presumptively efficient, government intervention is justified only in cases of market failure."); Yoshiro Miwa, *Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant*, 84 CORNELL L. REV. 1227, 1253 (1999) ("[A]dvocates of the corporate social responsibility position have too little confidence in the free market and excessive confidence in the competence of the government. We must question the value of governmental intervention in the market much more critically and thoroughly . . .").

²⁵³ Compare *supra* Part V.A.2 with Part V.A.3 (modeling labor markets without and with discrimination, respectively).

²⁵⁴ See Jolls, *Mandates*, *supra* note 12, at 226.

negative impact on women).²⁵⁵ Traditionally, courts and scholars have deemed the above doctrines more intrusive and troubling than the core prohibition on intentional discrimination. In that view, banning intentional discrimination simply forces employers not to make irrational decisions, while other forms of liability force employers to bear additional costs in the name of fairness.²⁵⁶

As Jolls notes, however, “there is no sharp line between antidiscrimination and accommodation”²⁵⁷ because even traditional discrimination liability forces employers to bear real costs.²⁵⁸ And as I have noted previously, “[w]ith discriminatory tastes, even bigoted discrimination looks rational” as an accommodation of nonmonetary worker or employer preferences.²⁵⁹ Given the lack of real difference between traditional antidiscrimination and “accommodation mandates,” the law can enforce the latter just as aggressively as the core ban against discrimination.

b. A Changed Focus for Antiharassment Law

This Article has discussed the subtle ways that male-dominated workplaces act to exclude women, resulting in highly durable gender gaps. This analysis supports Schultz’s proposal for a broad conceptual reform of anti-harassment law:

The focus of harassment law should not be on sexuality as such. The focus should be on conduct that consigns people to gendered work roles that do not further their own aspirations [H]arassment is not driven by a need for sexual domination but by a desire to preserve favored lines of work as masculine In this new account, hostile work environment harassment is closely linked to job segregation by sex.²⁶⁰

Antidiscrimination efforts should expand beyond the core ban on intentional discrimination because that limited focus is not enough to redress durable gender gaps. If civil liability is to counteract the disincen-

²⁵⁵ See Jolls, *Antidiscrimination*, *supra* note 29, at 652–66 (under disparate impact doctrine, “an employer . . . is required to incur special costs in response to the distinctive needs of a particular group of workers,” even though “the employer lacks any intention to treat a particular group of employees differently”).

²⁵⁶ See *id.* at 667–68 (citing critics of “accommodation mandates” who view such laws as being “profound[ly] apart” from the basic law against intentional discrimination).

²⁵⁷ *Id.* at 698.

²⁵⁸ *Id.* at 685–87 (stating that “prohibitions on discrimination based upon customer or coworker attitudes or upon correct employer beliefs about a particular group impose financial costs on employers, . . . forc[ing] employers to employ certain individuals even though they impose” added costs).

²⁵⁹ Moss & Malin, *supra* note 25, at 202, 234 (noting that, in the economic sense of the term, “all discrimination is ‘rational’ given the legitimacy of non-monetary utilities”).

²⁶⁰ Schultz, *Harassment*, *supra* note 43, at 1689–91.

tives to female labor force participation, it must focus on exclusionary harassment and other structural problems that deter women from entering male-dominated workplaces.

c. A Better Balance for Antidiscrimination Law: Attacking the Incentive To Avoid Lawsuits by Not Hiring Women or Minorities

The problem with strengthening laws against hostile work environments, promotion bias, and other discrimination is that an increased threat of lawsuits may discourage employers from hiring women. Because there are very few Title VII lawsuits alleging discriminatory failure to hire (compared to termination, promotion, or harassment),²⁶¹ employers may refuse to hire women to avoid the threat of lawsuit.²⁶² This problem is "an example of the theory of the second-best":

[W]ell-intentioned tinkering with a quirky, imperfect market can worsen matters . . . because efforts to correct only one market flaw can exacerbate other flaws. In employment law, imposing liability on an important but imperfectly provided good (employment of [a group]) can make the good provided "safer" (freer from discrimination) but decrease the quantity provided (increase the employer incentive to discriminate [in hiring]) [G]aps in a tight rule induce leakage through those gaps. When lawsuits are weaker at attacking refusals to hire than at attacking job terminations, the effect is a far cheaper expected penalty for refusal to hire.²⁶³

This is a difficult problem without a ready solution. Remedies beyond lawsuits, such as affirmative action and public subsidy programs for workplace accommodations and diversity reforms,²⁶⁴ are one type of response.

²⁶¹ See Donohue & Siegelman, *supra* note 84, at 1027 (finding that six times as many Title VII lawsuits allege discriminatory discharge as allege discriminatory failure to hire).

²⁶² See, e.g., Jolls, *Antidiscrimination*, *supra* note 29, at 691 (discussing costs to employers of lawsuits from minority or female workers); Jolls, *Mandates*, *supra* note 12, at 255-56 (noting that because accommodation mandates increase employer costs, employment levels of women and minorities may decrease); Moss & Malin, *supra* note 25, at 218 (noting that certain causes of action exist almost exclusively for those actually hired, such as harassment, FMLA leave, and disability accommodation, which contributes to the degree to which there are more suits by employees than by rejected applicants).

²⁶³ Moss & Malin, *supra* note 25, at 218-19 (citing Stephen F. Williams, *Second-Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932, 934-36 (1993); John J. Donahue III, *Employment Discrimination in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2588 n.19 (1994)).

²⁶⁴ See, e.g., Moss & Malin, *supra* note 25, at 219-24 (proposing public subsidies for workplace accommodations, in part based on this problem); Charny & Gulati, *supra* note 34, at 94 (proposing "cash incentives" for firms that demonstrate progress toward a fair promotion process).

However, there are also several litigation-based possible solutions. First, policymakers could make the current Title VII regime more comprehensive—i.e., fix the “uneven regulatory intensity” of Title VII²⁶⁵ by increasing damages for discrimination in hiring, thereby increasing the incentive to bring such lawsuits.²⁶⁶ Courts could do this without policy reforms by presumptively doubling or trebling the damages (e.g., as punitive damages, or by generously approximating actual damages) in failure-to-hire cases.²⁶⁷

Second, apart from facilitating failure-to-hire lawsuits, courts could make it dangerous from a liability standpoint for employers to have low representations of women. Courts could impose a lesser burden of proof on harassment or failure-to-promote plaintiffs in workplaces with very low representations of women. Such a shift in burdens would recognize that male-dominated workplaces are likely to have such problems as a work environment hostile to women and biased promotion procedures. The Supreme Court has used its knowledge of what “experience has proved”—essentially, applying common sense or taking judicial notice—in calibrating the burdens of proof in discrimination cases.²⁶⁸ It could do so again.

Third, after a finding of discrimination of any kind—hiring, promotion, or otherwise—if the defendant has few women in its workplace, courts could impose intrusive relief to induce greater hiring of women, even if the plaintiff had not claimed *hiring* discrimination. Any form of gender bias can decrease female workforce representation, so increasing the number of women employees is a proper remedy for a finding of any kind of gender discrimination, especially since a greater presence of women will likely reduce the problems associated with male-dominated workplaces. Courts could impose changes in employment practices, such as reforming subjective recruiting methods with discriminatory effects²⁶⁹ and requiring tough, meaningful antidiscrimination policies and procedures.

The main thrust here is that antidiscrimination law should be strengthened, with two shifts in focus: (1) addressing the sort of discriminatory

²⁶⁵ Ho, *supra* note 188, at 325 (citing Donohue & Siegelman, *supra* note 84, at 1016 fig. 6).

²⁶⁶ See Jolls, *Mandates*, *supra* note 12, at 281–82 (discussing this possibility but not acknowledging that “enhancing the penalties for hiring differentials would impose various sorts of administrative and other costs”).

²⁶⁷ Posner suggests double or treble damages “in cases in which the damages are small.” POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 26.4, at 723.

²⁶⁸ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575, 579–80 (1978) (describing the basic Title VII *prima facie* showing for the plaintiff—(1) belonging to a racial minority, (2) applying and being qualified for a job for which the employer was seeking applicants, (3) being rejected despite his qualifications, and (4) after his rejection, the position remaining open and the employer continuing to seek applicants from persons of complainant’s qualifications—as “proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations”) (emphasis added) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

²⁶⁹ See *supra* note 162 and accompanying text.

conditions that inhibit women from entering, or thriving in, male-dominated workplaces (e.g., exclusionary harassment and discriminatory conditions of employment); and (2) to redress the perverse incentive employers have to minimize lawsuit exposure by avoiding hiring women, increasing the penalties for hiring insufficient numbers of women.

3. *The Need To Move Beyond Civil Liability: Affirmative Action and Other Diversification Policies*

A full normative argument for affirmative action is beyond the scope of this Article. Still, this Article's central thesis—that banning discrimination is not enough to overcome a legacy of discriminatory exclusion and that true equality requires further steps—supports affirmative action.²⁷⁰

a. *The Lack of a "Sharp Line" Between Antidiscrimination and Affirmative Action*

In arguing that affirmative action is a necessary remedy for past discrimination as well as for present exclusion and segregation, this Article further supports the analytic point that there is "no sharp line between anti-discrimination and affirmative action."²⁷¹ Jolls has reached this conclusion based on an economic analysis showing that both "forms of intervention require employers to bear undeniable financial costs associated with a particular group of employees, and in that sense to 'accommodate' these employees."²⁷² Employing a sociological analysis, Adams has made much the same point about "how hard it is to tell the difference between affirmative action and nondiscrimination,"²⁷³ such as when affirmative action takes the form of minority outreach aimed at "reduc[ing] the discriminatory impact of word-of-mouth recruitment practices that had functioned as a barrier to entry" for excluded groups.²⁷⁴ Such an approach is about reforming a "status quo [that] maintained a system where minorities and women were being deprived of an opportunity to compete."²⁷⁵ Reform of this sort could be viewed as *either* antidiscrimination, in that it eliminates discriminatory effects of current employment practices, or affirmative action, in that it imposes gender- and race-conscious employment practices.²⁷⁶

²⁷⁰ For further arguments supporting affirmative action, see, for example, Adams, *supra* note 58; Ho, *supra* note 188, at 336–39.

²⁷¹ Jolls, *Antidiscrimination*, *supra* note 29, at 698.

²⁷² *Id.*

²⁷³ Adams, *supra* note 58, at 1134.

²⁷⁴ *Id.* at 1135.

²⁷⁵ *Id.* at 1134.

²⁷⁶ *Id.*

traditional entrants into segregated fields pave the way for others;²⁸² yet without such public campaigns, word of this progress is limited to anecdotes.

Virginia's nursing campaign targets men declining to enter an occupation typed "female," but such campaigns easily can do the reverse by targeting women not entering male fields. It may be tougher to attract women to male fields than vice-versa, however, because women's disincentive based on discrimination is likely greater than men's disincentive to avoid social stigma and stereotypes.²⁸³ Yet by showing women in traditionally male occupations, public campaigns could decrease women's perception that a woman becoming, for example, a police officer would be a truly aberrational thing. Just as importantly, these campaigns also could reduce male perceptions that women rarely enter these fields, possibly decreasing the likelihood that men will harass as perceived interlopers on male "turf" those women who do enter.²⁸⁴ Given that people regularly misestimate probabilities,²⁸⁵ it is possible that men and women alike overestimate the rarity of a woman entering a traditionally male field. This problem could be partially redressed by public campaigns, an almost unassailable form of "affirmative action."

4. Educational Efforts: A Different Dialogue About Discrimination and Exclusion

This Article's findings support a shift in the way we think about, discuss, and teach the subjects of discrimination and exclusion. Implicitly, we teach (in schools as well as in scholarly writings) about gender and race relations with a misleading focus on bad actors and exceptional heroes. Traditionally, the main problem is cast as one of specific "bad ideas" and "bad actors," mostly in the past: evil racist sheriffs, laughably backward sexist laws, and epic battles—invariably successful—to defeat these bad actors and their bad ideas. The story of the excluded groups traditionally is a story of heroes—exceptional women and minorities who achieved great things without the advantages held by white men, opened doors as pioneers for their group, or led major battles to defeat oppression.²⁸⁶

²⁸² See Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1, 22 (1995) (arguing that "reduction of racial prejudice is most affected by significant contact with members of other groups").

²⁸³ However, the reverse may be true because, with "male" work typically more highly paid than "female" work, "male" work generally is more desirable to women than "female" work is to men.

²⁸⁴ See *supra* Part III.B.2.b.ii (noting that men are more likely to harass women who enter what men perceive to be male occupational territory).

²⁸⁵ See Moss & Malin, *supra* note 25, at 207–08.

²⁸⁶ See, e.g., MINOW, *supra* note 141, at 114, 129 (noting that many states already require educational coverage of "political and economic contributions of women" and of prejudice against minorities).

b. Public Campaigns: A Less Controversial yet Important Form of "Affirmative Action"

Some programs that could be characterized as affirmative action, such as public campaigns aimed at encouraging an excluded group to enter an occupation, are important but relatively uncontroversial. Such programs are affirmative action in the sense of being expenditures of resources solely for the benefit of one group. However, because they do not involve directly choosing one applicant over another, it is hard to see a legal challenge to them; indeed, it is hard to see who would even have standing to bring a lawsuit.

For example, many states, including Virginia, often suffer from a shortage of nurses.²⁷⁷ Nursing is a traditionally female field, and the models in this Article show how labor shortages result when one gender essentially opts out of an occupation.²⁷⁸ Virginia could increase nurses' wages, but, as discussed above, such an ill-targeted compensating wage differential²⁷⁹ would pay higher wages mostly to women in the hopes that a few more men would enter the field.

One solution, chosen by the Virginia Partnership for Nursing, is a public campaign to attract men to nursing and promote the field to students who have not yet fully adopted social preconceptions about nursing. The Partnership hired a private firm to research why people (especially men) do not enter nursing and then to produce a public campaign to promote the field. In the campaign targeting adult men, images of stereotypically "manly" men appear above the question "Man Enough to Be a Nurse?"²⁸⁰ Less gender-focused materials target high school students ("there's really a career ladder . . . and the money is good") and grade school students ("nurse force" superheroes, male and female, showing nursing as exciting).²⁸¹

It is easy to mock this imagery or view it as a troubling appeal to stereotypes. However, Virginia's campaign is an important counter to a deeply ingrained stereotype—that men should not become nurses. Non-

²⁷⁷ "[T]he Virginia Study of Nursing and the U.S. Health Resources and Services Administration's estimate of the shortage . . . puts Virginia's nursing workforce at 15% below demand by 2005. A public crisis could be created with Virginia at 39th in the nation for nurse to patient populations." Press Release, Virginia Partnership For Nursing, Nurseschangelives.com Aims to Stop State's Nursing Shortage (Nov. 7, 2002), *available at* <http://www.virginiapartnershipfornursing.org/press.html> (last visited Feb. 1, 2004).

²⁷⁸ *See supra* Part V.B.

²⁷⁹ *See supra* Part V.D.1.

²⁸⁰ *See, e.g.*, Virginia Partnership for Nursing, Men in Nursing Poster (2003), *available at* http://www.virginiapartnershipfornursing.org/men_poster.pdf (last visited Feb. 1, 2004). The Oregon Center for Nursing now uses a similar poster. Oregon Center for Nursing, Men in Nursing Poster (2002) (showing male nurses in a variety of stereotypically male roles, including a Harley rider, a U.S. Navy Seal, a black belt in martial arts, a rugby player, and a snowboarder), *available at* http://www.oregoncenterfornursing.org/about/ocnnews/rn_poster2002.htm (last visited Feb. 1, 2004).

²⁸¹ Virginia Partnership for Nursing, Our Campaigns (2003), *available at* <http://www.virginiapartnershipfornursing.org/campaigns.html> (last visited Feb. 1, 2004).

The laudable intention behind this kind of storytelling is to show that discrimination is a discredited idea of the past and that discriminated-against groups have had great accomplishments and victories. However, these stories promote the flawed “perpetrator perspective”²⁸⁷ and teach, inadvertently or not, that: (1) discrimination is about problems in the past and a limited number of bad people in the present, and (2) women and minorities can and should overcome even the most fearsome obstacles without help.

Although well-intentioned, the basic “evildoers and heroes” tales neglect to tell the more enduring story. Exclusion remains, even absent any nefarious mastermind, and masses of women and minorities go about their lives facing a barrage of obstacles to their career efforts. To avoid perpetuating simplistic myths, we should reform our teachings about the challenges that women and minorities face.

First, using terms such as “exclusion” rather than “bigotry” would shift the discussion from one of specific bad actors to one of a social problem without a clear villain. Second, we should teach that remedying exclusion requires changing the hearts and minds of all, not just fighting the bigots.²⁸⁸ Third, our accounts of excluded groups should focus more on day-to-day struggles of average group members than on heroes. We should stress not only that women and minorities have overcome many obstacles, but also that obstacles still exist and have a substantial impact on the lives of many.²⁸⁹

VII. THE FAILURE OF TRADITIONAL LABOR ECONOMICS TO ACCOUNT FOR WOMEN’S PREFERENCES FOR DIVERSE WORKPLACES — AND A COMPARISON TO NONECONOMIC ANALYSES

This Article’s models have important implications not only for anti-discrimination law and policy but also, on a more theoretical level, for economic analysis of law. Especially in recent years, economics has evolved from the simplistic, inaccurate prediction that free markets will eliminate all discrimination except for a subset that is efficient. Increasingly, more left-leaning (or just realistic) economic analyses are considering ways in which women and other traditionally excluded groups will suffer continued exclusion from full and equal labor market participation—because,

²⁸⁷ See *supra* notes 250–251 and accompanying text.

²⁸⁸ Others have long advocated teaching tolerance and empathy, especially in childhood education, which society uses to impart basic values. See, e.g., MINOW, *supra* note 141, at 103, 107–08, 128–30; *id.* at 28 (noting that psychological research shows that by age six or seven, children have the cognitive development to take perspective of others); *id.* at 46 (noting that stereotyping can be passed on to children at an early age and can become part of their worldviews).

²⁸⁹ See, e.g., *id.* at 91 (advocating educational efforts “[e]liciting [f]acts and [n]arratives of [g]roup-based [h]arms”); *id.* at 135 (advocating “new histories giving increased attention to the experiences of previously neglected groups”).

for example, of various information problems endemic in real-world labor markets²⁹⁰ or opportunistic, anticompetitive "cartel-like" behavior by dominant groups to exclude other groups.²⁹¹

Other economic analyses have noted ways that discriminatory exclusion can be self-perpetuating. Members of traditionally excluded groups face warped incentives that can lead them rationally to adopt suboptimal labor market strategies,²⁹² and the exclusion may cause harmful psychological effects such as stereotype threat that further inhibit them from meeting their potential.²⁹³ Their exclusion is thus self-perpetuating, as members of included groups enjoy advantages that excluded groups do not.²⁹⁴

Though presenting a distinct theory of why gender gaps are durable, this Article follows that line of scholarship in spirit. This Article uses economic analysis to explain why the labor market will remain in a suboptimal state, with women not enjoying equal labor market opportunities and with certain firms and sectors finding it difficult to utilize an under-tapped pool of female labor. Several characteristics distinguish this Article's economic model from more simplistic traditional economic analyses that predict a gradual ascent into (near) equality. This Article incorporates into its analysis imperfect information, endogenous and nonlinear relationships among variables, and multiple equilibrium states of the labor market.

A. Imperfect Information: A Modification of Standard Labor Supply Theory

Imperfect information is a common feature of economic models predicting labor force exclusion of women and minorities. Most such models, however, speak of imperfect information not on the part of the excluded workers but on the part of employers who engage in statistical discrimination²⁹⁵ and otherwise form prejudices based on bad information.²⁹⁶ The models in this Article differ in that they address the troubling repercussions of imperfect information possessed by *workers in the excluded groups*. They identify such imperfect information as a cause of continued gender

²⁹⁰ See, e.g., Moss & Malin, *supra* note 25, at 200–08.

²⁹¹ See, e.g., Cooter, *supra* note 35, at 150–56 (stating that “[d]iscriminatory social groups are much like cartels, and a discriminatory norm is analogous to a price-fixing agreement [For example,] southern whites actively used the power of state and local government to reduce competition from blacks through . . . ‘Jim Crow’ legislation”); Roithmayr, *supra* note 165, at 731 (noting that “coercive social norms and social payoffs . . . operate to police discriminatory behavior in racist cartels” (citing Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1046–48 (1995))).

²⁹² See *supra* notes 36–38 and accompanying text.

²⁹³ See *supra* Part II.B.2.b.ii.

²⁹⁴ See *supra* Part II.B.2.b.iii.

²⁹⁵ See *supra* Part III.A.

²⁹⁶ See *supra* notes 66, 142–143 and accompanying text.

This simple point deeply contradicts standard economic analyses viewing policy as a result of exogenous preferences, such as a certain degree of desire for clean air: "The preference-shaping effects of legal rules cast doubt on the idea that . . . regulation should attempt to satisfy or follow some aggregation of private preferences When preferences are a function of legal rules, the rules cannot be justified by reference to the preferences."³⁰¹

While economic analyses regularly incorporate nonmonetary preferences, they often falter when preferences are endogenous. Advocates of economic methods can be surprisingly candid in admitting they "do not discuss all the potentially significant endogeneities in an economic analysis"³⁰² Endogeneity wreaks havoc on the simple cause-and-effect of "[t]he prototypical economic model commonly applied to law," where "preferences are exogenous and stable."³⁰³

2. *Endogenous Preferences and "Network Effects" as Endogeneity in Value of Employment to Women*

The models presented in this Article feature two quite different kinds of endogeneity. First, the historical lack of diversity causes women to seek out diversity. In a sense, this is the reverse of the sort of endogeneity Sunstein has discussed. In Sunstein's example, people may start to have a preference for something (such as a clean environment) only once they start to experience it.³⁰⁴ Here, in contrast, women may have a preference for something (diversity) precisely because they have *not* experienced it.

The second kind of endogeneity is the value women place on certain jobs. Historically, women "chose" fields such as teaching and nursing not because of an immutable natural preference but because those were the jobs open to them. Women's valuation of certain jobs is endogenously dependent on the representation of women in those jobs: the more women working in a given occupation, the more appealing that occupation is to women. This is an endogeneity not in how the preference arises, but instead in the value of the good (here, the job).³⁰⁵ Such endogeneity in the value of goods has significant implications for market efficiency.

³⁰¹ Sunstein, *Endogenous Preferences*, *supra* note 65, at 234–35.

³⁰² Posner, *Radical Feminist Critique*, *supra* note 299, at 527.

³⁰³ Baker, *supra* note 236, at 469.

³⁰⁴ See *supra* notes 300–301 and accompanying text.

³⁰⁵ Traditionally, the term "endogenous preference" refers more to the first phenomenon (preferences arising only due to experiences and market conditions) than to the second (the value of a good depending on how widespread it is). As discussed below, the latter is more typically described as a "network effect," but such effects do reflect endogeneity in the value of the good. Because this particular network effect stems from an endogenous preference (the first point) and reflects an endogeneity in the value women place on employment (the second point), the entire phenomenon of women preferring diverse workplaces seems best described as an "endogenous preference."

gaps and unequal opportunities for women—i.e., women rationally choose against predominantly male jobs under conditions of uncertainty.

This information problem is the key difference between this Article's view of labor supply (the decision whether and where to work) and that of standard labor economics. The standard labor-economic account of workers' decisions neglects this particular problem of imperfect information and assumes that the benefits of labor force participation are based on many other things (e.g., money, opportunities for advancement and training, quality of life).²⁹⁷ It often takes into account that women may draw less benefit from education and working than men because possible discrimination diminishes the expected value of certain career paths, thereby lessening the returns to investment in education or low-paid but valuable work experience (i.e., the human capital problem).²⁹⁸ However, the preference for diversity described in this Article applies regardless of whether the disparity resulted from discrimination, historical accident, or both.

B. Endogeneity in Preferences and in the Value of Employment

1. Endogeneity in Economic Analysis

Traditional economic models try to explain decisions, such as job choice, as being "caused" by independent variables, such as wages, hours, and location. Those variables are "exogenous" because the causation is one-way. Variables are "endogenous," in contrast, when they are also "affected by the variables in the economic model, rather than just affecting them."²⁹⁹ Cass Sunstein has discussed endogenous preferences in environmental law, noting that, contrary to the standard view of the law reflecting the public's or legislators' preferences, the law *influences* those preferences by, for example, letting people enjoy an environmental improvement they had not previously valued as much.³⁰⁰

²⁹⁷ See *supra* notes 21–23 and accompanying text.

²⁹⁸ See *supra* Part II.B.2.a.

²⁹⁹ Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 515, 527 n.34 (1993) [hereinafter Posner, *Radical Feminist Critique*].

³⁰⁰ Sunstein, *Endogenous Preferences*, *supra* note 65, at 223–25. Larry Ruff has given a similar explanation of how people demand environmental protection only once they start experiencing a better environment:

Pollution is not new What is new about pollution is what might be called the *problem* of pollution. Many unpleasant phenomena—poverty, genetic defects, hurricanes—have existed forever without being considered problems; they are, or were, considered to be facts of life, like gravity and death, and a mature person simply adjusted to them. Such phenomena become problems only when it begins to appear that something can and should be done about them.

Larry E. Ruff, *The Economic Common Sense of Pollution*, 19 PUB. INT. 69, 69–70 (1970).

The value of employment to women is endogenous in that the present rate of female entry depends on the past rate of female entry. Identically, the rate of workplace diversification depends on the level of diversity: the more diverse the workforce, the faster it diversifies; the less diverse the workplace, the slower it diversifies. Consequently, we cannot make the traditional assumption that the rate of female entry depends on inherent female preferences that exist as independent (exogenous) variables.

This form of endogeneity is, in a sense, a form of “network effect”: the benefit to women of participating in the workforce is higher as more women participate. Classic network benefits derive from using “network products,” such as e-mail, which “become more valuable as their use becomes more widespread.”³⁰⁶ Network benefits are interesting mainly because they explain how phenomena can be “self-perpetuating” even if different market outcomes would be more efficient. Traditional economics teaches that superior new products replace older, inferior products. But that is not necessarily the case if the old product is in widespread use and offers network benefits. Given such conditions, the old product’s “attraction becomes self-perpetuating” because, though inferior, it provides greater network benefits due to its widespread use.³⁰⁷ The superior product thus may fail due to the standardization of the old product. The new product would be more efficient if it achieved widespread use, but consumers will not switch to it because switching would sacrifice the network benefits of the standardized old product.³⁰⁸

Whatever the benefits of greater equality of opportunity, inequality may remain if there are existing gender disparities and network benefits to workforce participation. Among the network benefits in this context are the contacts and cultural advantages described earlier: men draw more benefit from certain workplaces than women do solely because historically there have been more men in the workforce and in positions of power. There are gender-based “networks”—male employees sharing commonalities and forming social bonds with other men in positions of power.³⁰⁹ These networks can also take the form of men harassing and subverting women who try to enter a male-dominated workplace.³¹⁰ There also are network benefits to workplaces remaining male-dominated due to the

³⁰⁶ Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 351 (1996); *id.* at 350 (defining network benefits).

³⁰⁷ *See id.* at 348 (discussing how firms employ commonly used contract terms as opposed to individually customized contract terms due to standardization trends); *infra* notes 318–319 and accompanying text (discussing how the QWERTY keyboard gained the dominant market position and therefore remained the standard despite being inferior for electronic typewriters and computers).

³⁰⁸ Kahan & Klausner, *supra* note 306, at 348.

³⁰⁹ *See supra* Part III.B.2.b.iii.

³¹⁰ *See supra* Part III.B.2.b.ii.

search and startup costs of bringing women into workplaces where they are underrepresented.

In sum, the endogeneity described in this Article is a fundamental characteristic of the labor market. Economic models that ignore such endogeneity fail to recognize that powerful forces beyond legally cognizable discrimination inhibit female entry into male-dominated workplaces. Such an omission can lead to undue optimism about male-dominated occupations becoming more gender-balanced. In fact, this endogeneity gives cause not only for pessimism about diversification but also for trepidation about *any* predictions because endogeneities can yield multiple equilibrium outcomes, some far preferable to others.

C. Multiple Equilibrium States and Path-Dependence: Many Market Outcomes Possible, Some Optimal and Some Not, Depending on Initial Conditions

A central feature of this Article's models is that there are multiple equilibrium states³¹¹ of the market—a variety of different “ultimate” outcomes in the progression toward greater diversity. A prediction of multiple equilibria is a major deviation from standard predictions about diversification, which (though not usually discussing “equilibrium states” explicitly) implicitly assume one unique equilibrium of equality (or near equality) among men and women. Where markets have multiple equilibrium states, predicting eventual outcomes is difficult; the result depends on initial conditions and the forces fostering or inhibiting change.

1. The Standard View: One Unique Equilibrium of Equality (or Near-Equality)

The traditional economic view, that free labor markets would eliminate virtually all discrimination, is a prediction that there is one unique equilibrium: equality for women and men, at least to the extent that both women and men have similar characteristics as workers and a similar desire to work. Inequality implies one or more of the following: that the labor

³¹¹ “When a market is in equilibrium, firms [or individuals] are doing the best they can and have no reason to change their price or output . . . [A] competitive market is in equilibrium when the quantity supplied equals the quantity demanded.” PINDYCK & RUBINFELD, *supra* note 69, at 430. It bears mention that the sort of equilibria discussed in this Article are “steady state equilibria”—equilibria that are stable states of the market, not just points at which supply equals demand (which, despite being equilibria, allow for the state of the market to change over time). See, e.g., Giovanni Piersanti, *Expected Future Budget Deficits, the Real Exchange Rate and Current Account Dynamics in a Finite Horizon Model*, 77 J. ECON. 1, 12–13 (2002) (discussing steady state equilibrium in relationship between budget deficits, exchange rates, and stock of bonds). For reasons of simplicity and conformity with the economic analysis of law literature (which refers merely to “equilibria,” whether the concept is supply equaling demand or a stable market state), however, this Article simply uses the term “equilibrium” throughout.

2. Path-Dependence: Less-than-Full Equality Will Result, Even After Discrimination Is Gone, Because of Historical Discrimination

As discussed above, existing social patterns resulting from a legacy of discrimination are a barrier to full equality. For example, gendered childcare norms remain powerful even after the eradication of much of the discrimination that gave rise to them and even though such norms might never have existed in a different labor market without a history of discrimination. Gendered childcare norms thus are an example of path dependence in labor markets. In path-dependent markets, "even small historical events, particularly those that occur early . . . , can have unexpectedly long-lasting effects on market outcomes . . . [and] produce a path far different from the one taken in the absence of those early events."³¹⁷ The classic example of path dependence is the "QWERTY" keyboard, which "was initially arranged . . . with letters that appeared together frequently coming from opposite hands on the keyboard, mainly to prevent the metal keys from jamming."³¹⁸ Eventually, computers no longer needed the QWERTY scheme to slow down typing to avoid jams, but the universal initial adoption of QWERTY prevented more efficient arrangements from evolving into widespread use.³¹⁹

Few traditional economic analyses of law consider path dependence.³²⁰ They assume that labor markets will reach efficient outcomes regardless of historical events because firms and individuals inevitably will put resources, including labor, to their most valuable uses. But there may be barriers to change that inhibit male-dominated workplaces from drawing in more women, such as the network benefits women derive from greater female workforce participation³²¹ and the "switching costs" faced by employers adapting male-dominated workplaces.³²² Where barriers to change

³¹⁷ Roithmayr, *supra* note 165, at 742.

³¹⁸ *Id.* (citing Paul A. David, *Understanding the Economics of QWERTY: The Necessity of History*, in *ECONOMIC HISTORY AND THE MODERN ECONOMIST* 35-36 (William N. Parker ed., 1986)).

³¹⁹ *Id.* at 743 (citing David, *supra* note 318, at 40-41, 45).

³²⁰ Posner suggests that "the convergence of legal systems is much slower than the convergence of technology and economic institutions." Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 584 (2000). Perhaps economic analyses tend to address path dependence in law insufficiently because in the markets that economics traditionally studies, path dependence is less significant. Microeconomics courses and textbooks, for example, typically explain supply-and-demand models by using agricultural commodities as primary examples precisely because in such markets economists can use simple, linear models to show how higher prices predictably correspond to lower sales and vice-versa. *See, e.g.*, PINDYCK & RUBINFELD, *supra* note 69, at 33-35 ("The wheat market has been studied extensively [, and its] . . . supply and demand curves are linear . . .").

³²¹ *See, e.g.*, Kahan & Klausner, *supra* note 306, at 348 (discussing how network benefits result in path dependence through the example of corporate contract terms); Roithmayr, *supra* note 165, at 742-43 (discussing path dependence in context of QWERTY keyboard).

³²² Roithmayr, *supra* note 165, at 747-49 (discussing how switching costs can yield path dependence).

market is progressing toward equality slowly, but is simply not there yet;³¹² that women naturally choose to participate in the labor market less than men do, leaving women less represented than men;³¹³ or that sex discrimination is efficient because it may reflect stereotypes that are sufficiently accurate bases for employment decisions.³¹⁴

There seems to be a broad ideological consensus that we are approaching the one unique equilibrium of (near) equality. Conservative law and economics scholars today, such as Posner and Epstein, typically argue that free markets will tend to eliminate inefficient, animus-based discrimination without government intervention, though other forms of discrimination are "efficient" and may persist.³¹⁵ Liberals frequently argue that further intervention, typically in the form of expanded Title VII liability, is a necessary development because the progress is too slow.³¹⁶ However, both implicitly agree: we are inevitably approaching an optimal level of equality.

³¹² See, e.g., POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 11.7, at 366 (asserting that "we can expect both the occupational and wage differences between men and women to narrow even without governmental intervention").

³¹³ See *supra* notes 144–149 and accompanying text (discussing courts embracing the "lack of interest" defense advocated by employers justifying the lack of women in their workplaces).

³¹⁴ See, e.g., Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 2 (1994) (arguing that "certain forms of race, sex, age, and disability discrimination will continue to survive in various quarters" because they are economically efficient "but that invidious forms of discrimination will not"); POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, § 11.7, at 366–67 (noting that "not all discrimination is inefficient," such as employers refusing to pay pregnancy benefits, and arguing that "antidiscrimination laws can boomerang against the protected class" because if "women workers have a lower marginal product [i.e., productivity] (maybe because they have invested less in their human capital), employers will have an incentive to substitute capital for labor inputs . . . [where] they employ many women").

³¹⁵ See *supra* note 314.

³¹⁶ See, e.g., Thomas J. Gehring, *Hostile Work Environment Sexual Harassment After Harris: Abolishing the Requirement of Psychological Injury*, Harris v. Forklift Systems Inc., 19 T. MARSHALL L. REV. 451, 453, 473–74 (1994) (arguing that the Supreme Court's broadening of sexual harassment law in Harris v. Forklift Systems, Inc., 507 U.S. 959 (1993), holding that employees can sue without having suffered "so much harassment as to suffer psychological trauma," was a "giant step in the right direction" that "was long overdue because too many people had to endure excessive harassment before they could prevail under Title VII," and expressing hope that with this "less stringent standard to meet when proving a violation of Title VII," Harris "will create more litigation in the immediate future, but then litigation may decline because employers will implement safeguards in the workplace to stop hostile work environment sexual harassment from occurring"); Marlisa Vinciguerra, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1721 (1989) (arguing that the development of the cause of action for sexual harassment furthered "the remedial promise of Title VII," and advocating a further strengthening of the doctrine).

cause inefficient arrangements to persist, markets are path-dependent because the market's early history (here, discrimination and exclusion) has impeded change, leaving the labor market at a segregated equilibrium.

Similarly, the history of discrimination has resulted in women's preference for diversity, a barrier to equality that remains powerful even after the eradication of much of the discrimination that gave rise to it. Several recent articles have noted other examples of barriers to equality that may remain even after we declare victory over the overt discrimination that gave rise to those barriers. Roithmayr has written at length about the "market lock-in" of various institutional, cultural, and other advantages for white law students due to discrimination long ago.³²³ Charny and Gulati, discussing discrimination in elite occupations characterized by great subjectivity and labor surpluses, have noted that once a discriminatory equilibrium occurs, individual firms find themselves with biased outcomes, such as an underrepresentation of women and minorities, even if they try to pursue ostensibly fair, neutral policies.³²⁴

Less discussed is the point that many barriers to equality would not have existed in a different labor market without a history of discrimination.³²⁵ Admittedly, this point is implicit in many discussions of obstacles to equality, but it bears emphasis because it contradicts a critical tenet of traditional laissez-faire economics—that market outcomes are presumptively efficient³²⁶ and cannot be tinkered with effectively because market forces tend to resist anti-equilibrium interventions.³²⁷ Path-dependent forces influence which among multiple equilibrium outcomes occur. So when a labor market reaches a certain equilibrium outcome—for example, if it stabilizes with less than full equality—we need not assume that this is the only (much less the best) possible outcome or that attempting to alter that equilibrium is futile or inefficient.

3. *Implications of Multiple Equilibria*

a. *Uncertain Predictions and Suboptimal Outcomes*

As discussed above, once path dependence exists, a market may have multiple equilibrium outcomes. A hypothetical labor market without a history of gender discrimination may feature full gender equity. However,

³²³ *Id.* at 785 (asserting that "white monopoly . . . is 'hard-wired' into the institutional network").

³²⁴ Charny & Gulati, *supra* note 34, at 76, 102.

³²⁵ See *supra* Part VII.B.2.

³²⁶ See *supra* note 252.

³²⁷ See, e.g., Ho, *supra* note 188, at 323–24 (discussing and citing "argument[s] that well-intentioned measures often backfire," including "both antidiscrimination measures and in protective market regulation," because "harmful quantity effects (in the form of lower quantities provided) are said to offset benefits along another welfare dimension, usually quality or price").

the actual labor market's history of gender discrimination affects its path over time, leaving some gender inequity in the ultimate equilibrium outcome.

Disciplines outside economics have recognized that "the inference of optimality from stability is pernicious" because "it ignores how path dependence can readily explain stability" of a suboptimal equilibrium.³²⁸ For example, as Baker has noted, "environmental literature suggests that traditional ideas about stasis and equilibria are inaccurate. Any kind of equilibri[um] we see in nature is temporary because change is an inevitable part of nature"; in that field, unlike in economics, there is a "now well-established nonequilibrium paradigm."³²⁹

The possibility of a suboptimal equilibrium has received some implicit recognition in the game theory notion that "strategic interactions can lead to inefficient results."³³⁰ An equilibrium will remain stable, however inefficient, so long as no incremental change is an improvement (i.e., so long as no one person or small group can improve matters by changing their actions). Sometimes, only a holistic, systemic change can improve matters, such as enforced pooling of health insurance to eliminate the adverse selection equilibrium of only less healthy people buying insurance.³³¹ A change might be an improvement, but it may be unlikely to occur absent a major legal or social effort to force society into a more efficient or socially desirable equilibrium.

The possibility of multiple equilibrium outcomes causes problems for economic analysis. Ian Ayres has noted that multiple equilibrium models are "underspecified,"³³² in that one of the "limits of rational choice explanations" is difficulty predicting which among the multiple equilibrium outcomes will occur.³³³ We need noneconomic theories to help us predict which equilibrium will prevail and to know what preferences exist that contribute to the dominance of an equilibrium. The economic analysis in this Article comports with noneconomic theories of gender inequity, yielding both a determinate prediction of which of the multiple equilibrium outcomes will occur and a compelling argument as to why this outcome is inefficient: our history of discrimination and exclusion makes it rational for women to choose more diverse workplaces, and that preference reinforces existing gender gaps, causing the market to stabilize at an inefficiently unequal equilibrium of male and female workers.

³²⁸ Baker, *supra* note 236, at 501.

³²⁹ *Id.* at 513.

³³⁰ Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1315-16 (1990).

³³¹ *Id.*

³³² *Id.* at 1310-11; see also Baker, *supra* note 236, at 509 (stating that "[m]ultiple equilibria do not provide simple and parsimonious answers . . . [and] often fail to provide any 'answer' at all"); Roithmayr, *supra* note 165, at 746 (noting that "markets are capable of producing multiple outcomes, which are unpredictable in advance").

³³³ Ho, *supra* note 188, at 341, n.68 (quoting JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 168 (1989)).

b. The Coase Theorem Violated

The idea that the same “market forces” may yield different outcomes given different initial conditions violates the Coase Theorem, which holds that as long as transactions occur freely and without cost, markets reach efficient results, regardless of the initial distributions of entitlements such as wealth, jobs, or property.³³⁴ In this Article’s models, however, different initial conditions yield different incentives for women. The traditional limitation on (and criticism of) the Coase Theorem is that, because few markets feature costless transactions, the exceptions swallow the rule.³³⁵ Given the nontrivial transaction costs that exist in most markets, not all efficient changes occur, so the initial state of the market helps determine the ultimate outcome and may prevent the market from reaching an efficient outcome.

A less-noted limitation on the Coase Theorem is that it “takes preferences as both static and given,”³³⁶ causing ignored endogenous preferences to wreak havoc on its predictions. As Sunstein has explained:

[A]llocation [of entitlements] may well have an effect on people’s preferences, since people tend to prefer things that have been initially allocated to them; it might also affect distributions and hence end-states Hence the Coase Theorem will sometimes be wrong insofar as it predicts the initial allocation of the entitlement will not affect outcomes.³³⁷

In this Article’s models, women’s preferences vary depending on the initial state of the labor market. If women historically had enjoyed equal employment rights, they would not value workplace diversity as much, if at all. But because women have not always enjoyed equal employment rights, the level of diversity of a firm (or occupation or sector) can matter a great deal. Consequently, compared to an unsegregated labor market, a heavily segregated labor market will feature women making different employment decisions, which will lead to different labor market outcomes with different levels of segregation.

³³⁴ PINDYCK & RUBINFELD, *supra* note 69, § 18.3, at 640; Sunstein, *Endogenous Preferences*, *supra* note 65, at 223.

³³⁵ E.g., Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 385–86 (1995) (“As Coase himself has pointed out, however, bargaining situations characterized by zero transaction costs are rare. In the presence of transaction costs, efficient allocation is increasingly difficult.” (citing RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988))).

³³⁶ Sunstein, *Endogenous Preferences*, *supra* note 65, at 223.

³³⁷ Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1017 & n.259 (1995) (citing Sunstein, *Endogenous Preferences*, *supra* note 65, at 223–24) (other citation omitted).

VIII. CONCLUSION

This Article's main substantive argument is that enduring occupational segregation can be explained, at least partly, by women's preference for diverse workplaces. That preference is entirely rational because women know that discrimination and harassment can inhibit their careers, but they do not know which occupations or particular firms discriminate. Choosing more gender-diverse workplaces is a rational solution to that information problem because more diverse workplaces are less likely to feature gender discrimination.

Though a rational solution to the problem of choosing where to work, the preference for diverse workplaces leads to quite troubling (and counterintuitive) aggregate labor market outcomes. Occupational segregation is far more durable than traditional economic analyses recognize: segregation remains even as the labor force as a whole comes to include more women and even absent ongoing discrimination. As a result, even as women come to comprise almost half the labor force, they still have an incentive to avoid the occupations and particular firms that remain male-dominated. A reduction in intentional discrimination may not be enough to eliminate this segregation: once there is some amount of discrimination somewhere in the labor market, it is rational for women to try to avoid that discrimination by choosing diverse workplaces.

These models have significant theoretical implications for law and economics generally. They depict labor markets in which preferences are not fixed but instead are endogenously dependent on market conditions. Thus, the Coase Theorem does not hold, and the market's evolution is path-dependent, yielding multiple possible equilibria, some far preferable to others as a matter of both efficiency and equity.

The normative implications of this theory are not quite categorical. Conservatives might argue that occupational segregation is a blameless result of women's own choices, not of employer wrongdoing. Blaming women's "choices," however, is a misinterpretation that ignores the reality that such "choices" are constrained by historical discrimination. To the contrary, the durability of segregation supports a litany of liberal policy and legal interventions, from tougher Title VII liability to affirmative action to educational reform. Such interventions appear necessary if we are ever to break the labor market out of the deeply flawed equilibrium that it has reached as a result of our society's history of discrimination and exclusion.